

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

29-4

969
VOLUME I

APPENDIX

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 23,833, 23,836, 23,839,
23,841, 23,842, 23,843

THE ASSOCIATED PRESS,
AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC.,
AIR TRANSPORT ASSOCIATION OF AMERICA, *et al.*,
AMERICAN TRUCKING ASSOCIATIONS, INC.,
AERONAUTICAL RADIO, INC., and
NATIONAL ASSOCIATION OF MOTOR BUS OWNERS,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents,

AMERICAN TELEPHONE AND TELEGRAPH COMPANY and
THE WESTERN UNION TELEGRAPH COMPANY,

Intervenors.

On Petitions to Review Orders of
The Federal Communications Commission

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United States Court of Appeals
for the District of Columbia Circuit

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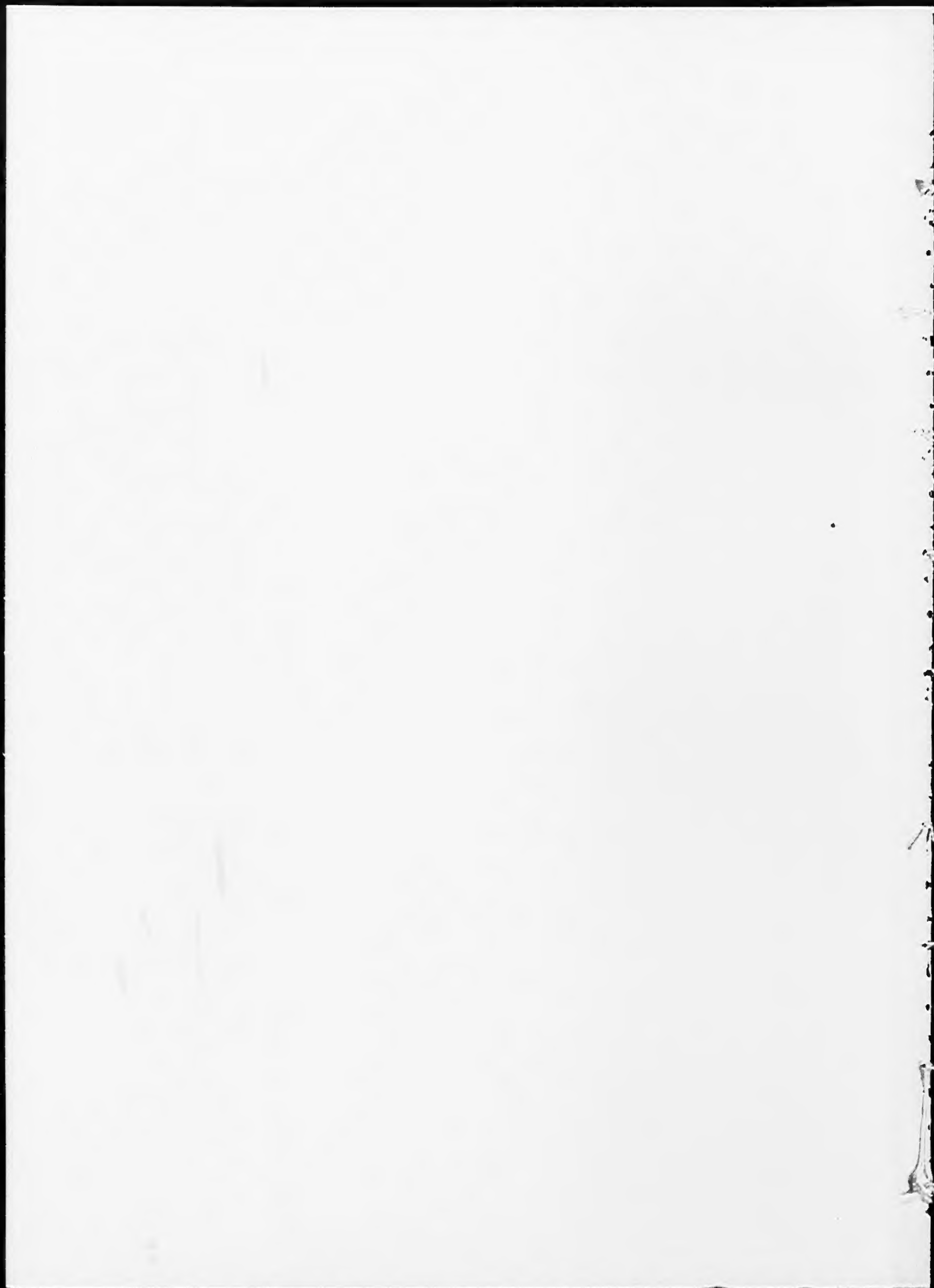


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RELEVANT DOCKET ENTRIES

<u>Date</u>	<u>Entry</u>
January 16, 1961	Telpak Tariff filed by ATA.
September 7, 1961	Commission Order instituting investigation as to the lawfulness of Telpak (Docket No. 14251).
December 24, 1964	Commission Memorandum Opinion and Order finding Telpak C and D lawful in shown by AT&T to be compensatory in further proceedings (Docket No. 14251).
November 9, 1966	Commission Memorandum Opinion and Order terminating Docket No. 14251 and folding the issue of the compensativeness of Telpak C and D into Docket No. 16258.
December 9, 1966	ARINC, <i>et al.</i> , Petition for Partial Reconsideration and Modification (Docket Nos. 14251, 15011, 16258).
December 21, 1966	Commission Memorandum Opinion and Order, <i>inter alia</i> , denying ARINC, <i>et al.</i> , Petition (Docket Nos. 14251, 15011, 16258).
January 9, 1967	AT&T Letter filing proposed rate revisions (Docket No. 16258).
October 27, 1967	AP, <i>et al.</i> , Petition for Clarification of Issues (Docket Nos. 15011, 16258).
January 23, 1968	Commission (Telephone Committee) Memorandum Opinion and Order granting petition in part (Docket Nos. 15011, 16258).
January 30, 1968	ATA Petition to Reject Proposed Telpak Rate Increases; United Air Lines, Inc., Petition to Enjoin Filing of Revised Rates (Docket Nos. 15011, 16258).
January 31, 1968	ARINC Petition for Preliminary Restraining Order (Docket Nos. 15011, 16258).
February 1, 1968	AT&T Transmittal No. 10001.
February 2, 1968	AP and Twin Coast Newspapers, Inc., Application for Review (Docket Nos. 15011, 16258; Transmittal No. 10001).

<u>Date</u>	<u>Entry</u>
February 5, 1968	American Trucking Ass'ns, Inc., Petition for Rejection of Tariffs (Transmittal No. 10001).
February 9, 1968	AT&T Opposition (Transmittal No. 10001).
February 16, 1968	Western Union Reply to Petitions (Docket Nos. 15011, 16258; Transmittal No. 10001).
February 21, 1968	AIA Petition for Temporary Relief (Docket No. 17457; Transmittal No. 10001).
February 26, 1968	AP and Twin Coast Reply to Oppositions (Docket Nos. 15011, 16258; Transmittal No. 10001).
March 1, 1968	Secretary of Defense Petition to Reject or Require Withdrawal of Proposed Increases (Transmittal No. 10001).
March 5, 1968	Bethlehem Steel Corp., <i>et al.</i> , Petition to Reject or Reschedule Effective Date of Rates (Transmittal No. 10001).
March 6, 1968	AT&T Opposition to Petition of AIA (Transmittal No. 10001).
March 11, 1968	Eastern Air Lines, Inc., Petition to Reject, Require Withdrawal, or Suspend and Investigate (Transmittal No. 10001).
March 13, 1968	AT&T Application No. 643 for special permission to withdraw revised rates.
March 25, 1968	AT&T Transmittal No. 10069.
March 25, 1968	ATA Petition for Suspension, Investigation, and Hearing on Tariff Increases (Docket Nos. 15011, 16258, 17457).
March 27, 1968	AIA Further Petition for Temporary Relief (Docket No. 17457; Transmittal No. 10069).
March 28, 1968	AT&T Reply to Petition for Suspension (Transmittal No. 10069).

<u>Date</u>	<u>Entry</u>
April 2, 1968	Secretary of Defense Petition for Suspension and Investigation and for an Accounting Order (Transmittal No. 10069).
April 5, 1968	AT&T Opposition to Further Petition for Temporary Relief (Transmittal No. 10069).
April 5, 1968	ARINC Petition for Suspension, Investigation and Other Relief (Transmittal No. 10069).
April 9, 1968	Western Union and Bell System Responses to Petitions for Consolidation and for Suspension, Investigation, and Hearing (Docket Nos. 15011, 17457, 16258; Transmittal No. 10069).
April 10, 1968	Commission Order suspending revised rates and instituting an investigation (Docket No. 18128).
July 10, 1968	Commission Memorandum Opinion and Order Deferring Docket 18128 until the completion of Docket Nos. 16258 and 17457, denying consolidation, and ordering an accounting (Docket Nos. 15011, 16258, 18128).
July 24, 1968	Commission Order including tariffs of Western Union in Docket 18128.
August 5, 1968	Bethlehem Steel Petition for Reconsideration (Docket Nos. 15011, 16258, 18128).
August 6, 1968	AIA Petition for Interim Relief (Docket No. 18128).
August 16, 1968	Western Union Opposition to Petitions for Reconsideration (Docket Nos. 15011, 16258, 18128).
August 19, 1968	AT&T Opposition to Petitions for Reconsideration (Docket Nos. 15011, 16258, 18128).
August 20, 1968	Bell System Opposition to Petition for Interim Relief (Docket No. 18128).
August 28, 1968	Commission Order denying petitions for reconsideration (Docket No. 18128).

<u>Date</u>	<u>Entry</u>
June 5, 1969	Letter from Commission to AT&T instituting continuing surveillance proceeding.
July 29, 1969	Commission Memorandum Opinion and Order noting statement of rate-making principals and factors and incorporating record of Phase I-B of Docket 16258 into Docket 18128 (Docket Nos. 15011, 16258, 18128).
September 19, 1969	Commission News Release denying Mrs. Bess Myerson Grant participation in continuing surveillance proceeding.
October 1, 1969	AT&T Transmittal No. 10609.
October 9, 1969	Secretary of Defense Petition to Reject Rate Increases (Transmittal No. 10609).
October 10, 1969	AP Petition to Reject Rate Increases; ATA, <i>et al.</i> , Petition to Reject Further Telpak Rate Increases; AIA Petition to Reject Further Telpak Rate Increases; Bethlehem Steel Corp., <i>et al.</i> , Petition to Reschedule Effective Date for Increase in Telpak Rates (Transmittal No. 10609).
October 15, 1969	Commission Notice of Proposed Rule Making in Docket No. 18703.
October 17, 1969	Petitions for Suspension and Accounting filed by the Association of American Railroads, American Trucking Associations, Secretary of Defense, ARINC, National Association of Motor Bus Owners, ATA, <i>et al.</i> , and Bethlehem Steel Corp., <i>et al.</i> (Transmittal No. 10609).
October 24, 1969	AT&T Opposition (Transmittal No. 10609).
October 27, 1969	AIA Reply (Transmittal No. 10609).
October 29, 1969	Commission Memorandum Opinion and Order suspending the proposed rate increases for three months and ordering accounting (Docket No. 18128).
November 5, 1969	Commission News Release announcing MTT rate reductions in continuing surveillance proceedings.

<u>Date</u>	<u>Entry</u>
November 18, 1969	ATA Petition for Reconsideration Predicated Principally Upon New Facts Reflecting Basic Misconceptions and Resulting in Apparent Prejudgment (Docket No. 18128; Transmittal No. 10609).
November 19, 1969	AIA Motion to Amend Order (Docket No. 18128).
November 26, 1969	Western Union Opposition to Petition for Reconsideration of "Airline-Industry Parties" (Docket No. 18128; Transmittal No. 10609).
November 28, 1969	Western Union Opposition to Motion of Aerospace Industries Association, Inc., to Amend Order (Docket No. 18128).
November 28, 1969	AIA Comments concerning Petition for Reconsideration (Docket No. 18128; Transmittal No. 10609).
December 2, 1969	AT&T Opposition to Petition for Reconsideration (Docket No. 18128).
December 3, 1969	AT&T Opposition to AIA Motion (Docket No. 18128).
December 5, 1969	AIA Reply to AT&T Opposition (Docket No. 18128).
December 5, 1969	Petitions for Reconsideration filed by Penn Central Transportation Company and Bethlehem Steel Corp., <i>et al.</i> , (Docket No. 18128).
December 8, 1969	Petitions for Reconsideration filed by the Association of American Railroads and National Association of Motor Bus Owners (Docket No. 18128).
December 10, 1969	Letter from Commission to Senator Warren G. Magnuson clarifying continuing surveillance procedures.
December 16, 1969	Bell System Opposition (Docket No. 18128).
December 19, 1969	Western Union Further Opposition to Petitions for Reconsideration (Docket No. 18128).
December 19, 1969	ATA, <i>et al.</i> , Motion for Stay (Docket No. 18128; Transmittal No. 10609).

<u>Date</u>	<u>Entry</u>
December 23, 1969	Commission Memorandum Opinion and Order denying the request of the National Association of Regulatory Utility Commissioners to suspend or reject rates filed pursuant to continuing surveillance proceedings (Transmittal No. 10664).
December 23, 1969	AT&T Opposition to additional petitions for reconsideration (Docket No. 18128).
December 30, 1969	Bell System Opposition to Motion for Stay (Docket No. 18128).
January 2, 1970	AP Petition for Review filed.
January 5, 1970	Petitions for Review filed by AIA, Air Transport Association, <i>et al.</i> , American Trucking Associations, ARINC, and National Association of Motor Bus Owners.
January 16, 1970	Commission Memorandum Opinion and Order denying petitions for reconsideration (Docket No. 18128).
January 22, 1970	ATA, <i>et al.</i> , Motion to Amend Petition for Review.
January 26, 1970	National Association of Motor Bus Owners Motion to Amend Petition for Review.
January 28, 1970	Commission Memorandum Opinion and Order denying reconsideration in continuing surveillance proceeding (Transmittal No. 10664).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 66-1005
90296

In the Matter of)	
)	
AMERICAN TELEPHONE AND TELEGRAPH COMPANY)	
)	
Regulations and Charges for TELPAK)	DOCKET NO. 14251
Service and Channels)	
)	
In the Matter of)	
)	
AMERICAN TELEPHONE AND TELEGRAPH COMPANY)	
and the Associated Bell System Companies)	
)	
Charges for Interstate and Foreign Com-)	DOCKET NO. 16258
munication Service)	
)	
In the Matter of)	
)	
AMERICAN TELEPHONE AND TELEGRAPH COMPANY)	
)	
Charges, Practices, Classifications, and)	DOCKET NO. 15011
Regulations for and in Connection with)	
Teletypewriter Exchange Service)	

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Wadsworth absent.

1. The Commission has before it (1) its Tentative Decision herein (38 F.C.C. 371); (2) its Memorandum Opinion and Order of December 23, 1964 (37 F.C.C. 1111) substantially adopting the Tentative Decision; (3) its Memorandum Opinion and Order of May 3, 1965 (38 F.C.C. 761) substantially denying reconsideration of the preceding Memorandum Opinion and Order; and (4) the decision of the U. S. Court of Appeals for the District of Columbia Circuit affirming the three preceding documents, together with the order of that Court terminating its injunction as of October 18, 1966, which stayed the effect of the Commission Order of December 23, 1964, pending determination of the appeal. Since the Commission's order was to have taken effect on September 1, 1965, it appears that it should be superseded by a current order giving effect to the above-enumerated opinions as well as subsequent developments affecting this proceeding.

2. Our previous order provided that:

"IT IS ORDERED, That on or before September 1, 1965, A.T.&T. shall file on 30 days' notice revised tariff schedules which will eliminate the unlawful discrimination found to exist between TELPAK A and B classifications on the one hand and private line rates on the other so as

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to unify the rates for the separate tariffs at levels indicated to be appropriate by the results of its cost studies now in progress in connection with docket No. 14650, together with data to support the revised tariff schedules;

"IT IS FURTHER ORDERED, That on or before September 1, 1965, A.T.&T. shall submit for the record in this proceeding additional cost data on the basis of which the Commission may determine whether or not the existing rates for TELPAK C and D are compensatory, together with such revised tariff schedules as may be indicated by such data;"

3. On October 27, 1965, we instituted an investigation into the lawfulness of the charges of American Telephone and Telegraph Company and the Associated Bell System companies for interstate and foreign communication service. In addition to issues relating to the overall level of Bell System earnings, that proceeding also raises questions relating to the relevant rate making principles and factors which shall control in the distribution of the Bell System's total revenue requirements among its principal rate classifications. However, the Commission's order, while enumerating the other principal classifications of service offered by the Bell System, specifically excluded TELPAK because of the pendency of the proceeding in our Docket No. 14251 which was then before the Court of Appeals. It is accordingly appropriate to place the surviving TELPAK services into the scope of Docket No. 16258 and, upon the filing of tariffs unifying TELPAK A and B into the private line service, to terminate Docket No. 14251.

4. The purpose of Docket No. 16258, as we stated in our Memorandum Opinion and Order of January 26, 1966 (FCC 66-71) is, among other things, to deal with variations in the level of earnings of different classes of service and not with individual rate components within rate classifications. We recognize, however, that when respondents comply with our order herein originally issued in Docket No. 14251, adjustments of rates for TELPAK A and B services and/or existing private line rates could result and this may raise specific and detailed rate issues. Further, respondents' additional cost data as to TELPAK C and D, being required to be filed in Docket No. 16258, may be accompanied by proposed changes in those rates. We do not wish such specific rate issues to become part of the more general issues of Docket No. 16258. Accordingly, when such tariff filings are made, if need therefor arises, it is expected that those issues will be examined in a separate docket.

5. Accordingly, IT IS ORDERED, That, within 60 days from the date of this order, A.T.&T. shall file revised tariff schedules, effective on 30 days' notice, which will eliminate the unlawful discrimination which has been found to exist between TELPAK A and B classifications on the one

band and private line rates on the other so as to unify the rates for the separate tariffs at appropriate levels, together with data to support the revised tariff schedules;

IT IS FURTHER ORDERED, That, upon the filing of such tariff schedules and supporting data in compliance herewith, the proceedings in Docket No. 14251 shall be deemed TERMINATED;

IT IS FURTHER ORDERED, That the Commission's Order of October 27, 1965, in Docket No. 16258 (FCC 65-959) IS AMENDED so that Issue No. 3 herein shall read as follows:

"3. Whether the charges for (1) message toll telephone service, (2) WATS, (3) TWX, (4) private line telephone grade service, (5) private line telegraph grade service, (6) TELPAK C, (7) TELPAK D, and (8) all other service are or will be just and reasonable within the meaning of Section 201(b) of the Communications Act of 1934, as amended;"

IT IS FURTHER ORDERED, That the record in Docket No. 14251 IS INCORPORATED BY REFERENCE in the record of Docket No. 16258.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

Adopted: November 9, 1966

Reelased: November 10, 1966

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of)	
)	
AMERICAN TELEPHONE AND TELEGRAPH COMPANY)	DOCKET NO.
)	14251
Regulations and Charges for TELPAK)	
Service and Channels)	

In the Matter of)	
)	
AMERICAN TELEPHONE AND TELEGRAPH COMPANY)	DOCKET NO.
and the Associated Bell System Companies)	16258
)	
Charges for Interstate and Foreign)	
Communication Service)	

In the Matter of)	
)	
AMERICAN TELEPHONE AND TELEGRAPH COMPANY)	DOCKET NO.
)	15011
Charges, Practices, Classifications, and)	
Regulations for and in Connection with)	
Teletypewriter Exchange Service)	

PETITION FOR PARTIAL RECONSIDERATION AND MODIFICATION
(To Be Acted Upon By the Commission En Banc)

Petitioners herein are Aeronautical Radio, Inc. (ARinc), Air Transport Association of America (ATAA), intervenors in Docket Nos. 14251 and 16258, American Airlines, Inc., Eastern Airlines, Inc., American Trucking Associations, Inc., Twin Coast Newspapers, Inc., and Lockheed Aircraft Corporation, intervenors in Docket No. 14251, and United Airlines, Inc., intervenor in Docket No. 16258.

Pursuant to the provisions of Section 405 of the Communications Act of 1934, as amended, and Section 1.106 of the Commission's Rules and Regulations, Petitioners respectfully request a partial reconsideration and modification of the Commission's memorandum opinion and order (FCC 66-1005, 31 Fed.Reg. 14606), released on November 10, 1966, as follows:

a. That the Commission delete the second ordering clause of paragraph 5, namely, that the proceedings in Docket No. 14251 shall be "terminated" upon the filing of tariffs unifying TELPAK A and B private line rates;

b. In lieu thereof, that, consistent with the prior orders of the Commission considered by the Court of Appeals, the Commission direct that any specific residual rate issues with respect to TELPAK C and D be reserved for determination in existing Docket No. 14251.

In support thereof, Petitioners respectfully state as follows:

1. Petitioners do not seek to modify that part of the Commission's order incorporating TELPAK C and D charges into the General Rate Investigation, Docket No. 16258, for what has been stated to be the limited purposes of that proceeding.

2. The Commission itself, until this order, contemplated that its further consideration of TELPAK C and D rates would be retained in the original TELPAK proceeding, Docket No. 14251, by its order in that case (37 F.C.C. 1111, 1118), providing that by a date certain ^{1/}:

A.T.&T. shall submit for the record in this proceeding additional cost data on the basis of which the Commission may determine whether or not the existing rates for TELPAK C and D are compensatory [Emphasis added.]

3. This was also the information and understanding of the Court of Appeals in its review of the TELPAK case, American Trucking Associations, Inc. v. FCC, 8 R.R. 2d 2026, 2031, 2033 (D.C. Cir., 1966) ^{2/}:

To place the problem in easier perspective we state first the conclusion last stated by the Commission in its orders. This was to remand Telpak C and D for further evidence and study. The Commission did not make final findings or reach final conclusions in respect to the two Telpak subdivisions which dealt with carrier bandwidths of 240 kc (Telpak C) and 1000 kc (Telpak D). It remanded those two parts of the Telpak tariff. It considered the parts of the tariff dealing with carrier wave bandwidths of 48 kc and 96 kc, that is, Telpak A and B.

. . . .

^{1/} Now January 9, 1967, by memorandum opinion and order (FCC 66M-1582) of the Telephone Committee, released November 25, 1966, in Docket Nos. 16258 and 15011.

^{2/} Petitioners herein who were intervenors in Docket No. 14251 will file with the Supreme Court of the United States a petition for writ of certiorari within the next week. This petition for partial reconsideration and modification is submitted without waiving any rights as parties seeking review by petition for certiorari in that case.

Upon consideration the Commission concluded that the Telpak C and D rates were justified by competition, and this conclusion necessitated a determination as to whether these rates were compensatory, that is, whether they would bear their own costs or would be a burden on other customers of the Company. . . . Upon completion of these inquiries the Commission was unable to determine whether the C and D rates would sustain the burden of their own costs and thus supply a justification of the differences between those rates and the rates charged other customers. However, since the disposition of Sections C and D of the Telpak tariff is not before us on this appeal, we need not consider this phase of the matter. [Emphasis added.]

4. No reason has been suggested why the Commission now proposes a change of procedure by terminating the proceedings in Docket No. 14251 upon the unification of TELPAK A and B rates. To the contrary, Petitioners submit that the C and D part of the TELPAK case should be carried to a conclusion in Docket No. 14251, where (1) the questions of lawfulness have been properly raised; (2) the framework for the inquiry has been constructed; (3) substantial evidence has been adduced on TELPAK C and D; and (4) indeed, the lawfulness of TELPAK C and D has been resolved, except for the one residual question whether rates for TELPAK C and D are compensatory.

5. The General Rate Investigation is not a substitute for a complete hearing in Docket No. 14251. The Commission has made it clear that it will not in the General Rate Investigation inquire into internal rate components,

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practices, and regulations within each of the principal rate classifications of service. Sports Network, Inc., 3 F.C.C. 2d 618, 624 (1966); American Telephone and Telegraph Company (Revision of Definition of Service Point), 2 F.C.C. 2d 359, 360 (1966).

6. Although the Commission has ordered that the record in Docket No. 14251 be incorporated by reference in the record in Docket No. 16258, this left-handed procedure is manifestly not adequate to secure full and fair consideration of the proper level of TELPAK C and D rates, in either the General Rate Investigation (Docket No. 16258) or in some nebulous separate docket. Such consideration can be assured only in the pending TELPAK proceeding, Docket No. 14251.

WHEREFORE, THE PREMISES CONSIDERED, Petitioners respectfully request:

a. That the Commission delete the second ordering clause of paragraph 5, namely, that the proceedings in Docket No. 14251 shall be "terminated" upon the filing of tariffs unifying TELPAK A and B private line rates; and

b. In lieu thereof, that, consistent with the prior orders of the Commission considered by the Court of Appeals, the Commission direct that any specific rate issues with respect to TELPAK C and D be reserved for

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determination in existing Docket No. 14251, subject
to further order by the Commission.

Respectfully submitted,
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Its Attorney

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 65-1132
92753

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

Regulations and Charges for TELPAK
Service and Channels

DOCKET NO. 14251 ✓

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
and the Associated Bell System Companies

DOCKET NO. 16258

Charges for Interstate and Foreign Com-
munication Service

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

Charge, Practices, Classifications, and
Regulations for and in Connection with
Teletypewriter Exchange Service

DOCKET NO. 17311

MEMORANDUM OPINION AND ORDER

By the Commission:

1. The Commission has before it various petitions for reconsideration seeking amendment of its Memorandum Opinion and Order (FCC 66-1005) released November 10, 1966, as follows: (1) Petitions for reconsideration filed by the New York Central Railroad Company dated December 6, 1966, and the Seaboard Air Line Railroad Company dated December 9, 1966, which were concurred in or joined in by The Chicago, Milwaukee, St. Paul and Pacific Railroad; Chicago, Rock Island and Pacific Railroad Company; Bessemer and Lake Erie Railroad Company; the Lake Terminal Railroad Company; the Clinchfield Railroad Company; the Pennsylvania Railroad Company; and the Erie-Lackawanna Railroad Company; which petitions requested the Commission to modify paragraph 5 of said Order by changing the phrase "effective on 30 days' notice" to read "effective on 180 days' notice;" (2) Petitions for reconsideration filed by the Associated Press; and Aeronautical Radio, Inc., both dated December 1, 1966, requesting that the Commission modify paragraph 5 of said Order by changing the phrase "effective on 30 days' notice" to "effective on April 1, 1967;" (3) Petitions for reconsideration by NAM Telecommunications Committee and American Trucking Association, Inc., both dated December 12, 1966, requesting the Commission to change paragraph 5 of

said Order by changing the phrase "effective on 30 days' notice" to "effective on 60 days' notice;" (4) A petition for reconsideration by the Administrator of General Services requesting the Commission to reconsider said Order and to (a) clarify that order with respect to the rate issues now considered to be within Docket No. 16258; (b) specify the nature of the evidentiary showing required prior to the termination of proceedings in Docket No. 14251; and (c) permit the filing of proposed revisions in rates for TELPAK A, B and Private Line rates rather than tariff schedules; (5) A Petition for Partial Reconsideration and Modification filed jointly by Aeronautical Radio, Inc., Air Transport of America, American Air Lines, Inc., Eastern Air Lines, Inc., American Trucking Associations, Inc., Twin Coast Newspapers, Inc., Lockheed Aircraft Corp., and United Air Lines, Inc., requesting that the Commission modify paragraph 5 of said Order by deleting the second ordering clause, which, the petitions state, provide for the termination of Docket No. 14251 "upon the filing of tariffs unifying TELPAK A and B private line rates" and direct that "any specific rate issues with respect to TELPAK C and D be reserved for determination in existing Docket No. 14251;" (6) A statement in support of petitions for reconsiderations filed by the Bell System Respondents dated December 12, 1966, which generally supports the requests for additional time contained in the petitions for reconsideration of Aeronautical Radio, Inc., the Associated Press, and the New York Central Railroad Company; (7) Opposition of The Western Union Telegraph Company to Petitions for Reconsideration of Order Released November 10, 1966, urging that the Commission deny all petitions for reconsideration filed herein, which seek extensions of time; (8) A "Motion to Accept Partial Late Filing," filed by The Western Union Telegraph Company on December 19, 1966, requesting that its opposition to the petitions for reconsideration of Aeronautical Radio, Inc. and Associated Press be accepted even though filed late;^{1/} (9) Opposition of The Western Union Telegraph Company to Petition for Reconsideration and Modification, requesting the Commission to deny the joint petition for partial reconsideration and modification filed by Aeronautical Radio, Inc., et al.

2. Our Memorandum Opinion and Order (ICC 66-1005), released November 10, 1966, ordered, in paragraph 5 thereof:

"...That, within 60 days from the date of this order AT&T shall file revised tariff schedules, effective on 30 days notice, which will eliminate the unlawful discrimination which has been found to exist between TELPAK

^{1/} We accept Western Union's opposition even though filed late as to these two petitions for reconsideration.

A and B classifications on the one hand and private line rates on the other, so as to unify the rates for the separate tariffs at appropriate levels, together with data to support the revised tariff schedules;

"It is further ordered, that, upon the filing of such tariff schedules and supporting data in compliance herewith, the proceedings in Docket No. 14251 shall be deemed terminated;"

3. In order that determination on these petitions be fully effective, timely execution of our functions requires that we act on said petitions prior to the full time allotted by our rules for filing of oppositions and replies to oppositions. We will therefore consider the petitions on their merits without further delay.

4. The petitions filed by the various railroad companies rely on the petition of the New York Central Railroad Company for the factual basis supporting their request. In brief, they aver that a minimum of 90 days from the date of the filing of any tariff changes would be required in order for them to evaluate the impact of such changes, to engineer alterations to their communications networks, and to order facilities thereafter required. An additional 90 days is requested to permit delivery of any facilities ordered from AT&T, but no specific facts justifying these time intervals are offered.

5. The Associated Press and ARINC, in their petitions, detail the extent of TELPAK circuitry which they now lease from AT&T and the problems which may be involved in the event that AT&T eliminates TELPAK A and B service offerings. They further state that because of the extent of the network involved and the possible rearrangement required, 30 days is not sufficient within which to accomplish such rearrangement and requests that the tariff changes be made effective April 1. AP and ARINC point out that they will not have an opportunity to know what the new rates are until January 9, 1967. AT&T, in order to provide new or different private line services to a customer, requires that orders be placed by the 15th of the prior month. AP and ARINC point out that they thus have less than a week to rearrange their systems in light of the new rates.

6. The NAM Telecommunications Committee, in its petition, states that a restructuring of TELPAK facilities will require a comprehensive reevaluation and analysis of virtually each communications circuit used by a given manufacturing company in its nation-wide communications network. It supplies details by reference to two TELPAK users and concludes that 30 days is not a sufficient time to permit required changes of present facilities, and requests that the tariff changes be made effective on 60 days notice.

7. The American Trucking Association, Inc., in its petition, outlines the complexity of the trucking industry's shared TELPAK A and B networks and the required AT&T policy with regard to notice of changes and concludes that 30 days is insufficient to permit a proper reexamination, and requests that 60 days notice be given before tariff revisions become effective.

8. Aeronautical Radio, Inc., and those joining in its petition for partial reconsideration and modification, urges that Docket No. 14251 not be terminated, and that any rate issues with respect to TELPAK C and D be reserved for determination in that docket, and cites the Commission's own order (37 FCC 1111, 1118) to demonstrate that the Commission anticipated determining the remaining issues with respect to TELPAK C and D in Docket No. 14251. It further states that the Commission has made it clear that it will not inquire into internal rate components, practices and regulations within each of the principal rate classifications of service in Docket No. 16258 wherein the record in Docket No. 14251 has been incorporated by reference.

9. The Administrator of General Services, in his petition for reconsideration, requests the Commission to clarify its order and to modify it in the following respects:

"(1) Inclusion in that order of confirmation that rate issues will be resolved in Docket No. 16258;

"(2) Inclusion in that order of a specific requirement that TELPAK rates be shown on the record to be non-discriminatory, just and reasonable prior to the termination of proceedings in Docket No. 14251; and

"(3) Inclusion in that order of permission for the filing of proposed revisions in rates, rather than tariff schedules, for TELPAK's A, B, and Private Line services."

10. The Bell System Respondents in their statement in support of petitions for reconsideration state that "The elimination of TELPAK A and B, together with the concurrent changes in the rates for private line telephone and telegraph services which may be called for in compliance with the Commission's Order, will inevitably dictate major restructuring of these networks. The users of these services must evaluate a multitude of combinations of a wide range of alternatives including TELPAK, private line telephone, private line telegraph, WATS and message toll telephone service, as well as possible variations in their own methods of operations. After the necessary decisions have been made, additional time will be required for processing the orders for the services desired," and in support of the petitions of

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Aeronautical Radio, Inc., Associated Press and the New York Central Railroad Company, states that the time between the filing of the tariff revisions and their effective dates "should be extended to a time which will meet the requirements of the users for reasonable time to accomplish the necessary modifications."

11. Western Union, in its opposition to the foregoing petitions and in urging the Commission to deny said petitions, states that petitioners have had ample time to consider and evaluate the communications requirements in view of the extended period of litigation involving these rates. It points out that petitioners have enjoyed the benefits of rates which have been found to be unlawfully discriminatory for nearly 6 years. It also points out that no actual service will be lost by virtue of the new rates. With regard to the petitions which would continue the proceedings within the framework of Docket No. 16251, Western Union concedes that any problems arising with respect to the new rates should be considered in a new proceeding.

12. The Commission, in amending its order of October 27, 1965, in Docket No. 16258 (ICC 65-959) to include a consideration of TELPAK's C and D within that docket, was mindful of the fact that the only remaining issue with respect to TELPAK C and D was whether the existing rates were compensatory. This issue deals with the over-all level of earnings for the services and does not relate to a detailed analysis of the specific rates involved. Accordingly, since Docket No. 16258 contains within it the issues of the proper rate of return and the relationships of the level of earnings of the different classes of service, it is the proper proceeding within which to determine the compensatory nature of TELPAK C and D and their relationship to the other services.

13. The Commission has several times in formal orders stated that it will not deal with specific rate issues in Docket No. 16258. That docket, among other things, deals with the over-all rate of return of the Bell System Respondents and the level of earnings of different classes of service and not with individual rate components within rate classifications. Sports Network, Inc., 3 FCC 2d 614, 614 (1966); In the Matter of AT&T Revision of Definition of Service Points, 2 FCC 2d 359, 360 (1966); AT&T, FCC 66-1005 (November 10, 1966). We see no reason to depart from our prior determinations in this matter. The filing of revised tariff schedules with respect to TELPAK A and B classifications and private line rates could raise anew the issue of their justness or reasonableness or discriminatory nature and if so the Commission, on its own motion or upon receipt of a complaint, could issue an order instituting an investigation into those matters. Docket No. 16258 is not an appropriate vehicle for making that type of determination. As we have previously stated, the only issue

remaining with respect to TELPAK C and D as to whether the rates are compensatory. As stated in paragraph 12 herof, this issue deals with the over-all level of earnings and does not relate to a detailed analysis of the specific rates involved, and is therefore appropriate for determination in Docket No. 16251.

14. We can see no value in the proposal that AT&T file proposed revisions in rates rather than tariff schedules. Orderly procedures require that a date certain be fixed for the elimination of the unlawful discrimination by means of effective tariff schedules. In order to eliminate the discrimination which we have found to exist as rapidly as possible and consistent with our statutory duties, we will not amend our order requiring AT&T to file revised tariff schedules. As stated above, if petitions are filed with respect to these tariff schedules, or on our own motion, we may review such schedules to assure conformity with our prior determinations with respect to TELPAK rates and charges or as to whether they are otherwise lawful. Of course, such procedure may not be utilized to re-open the same issues as were resolved in Docket No. 16251.

15. We agree generally with determination that after nearly 6 years and much litigation the unlawful discrimination should be eliminated without undue delay. We do recognize, however, the administrative problem pointed out by AT&T and Bell, one arising from the more or less fortuitous circumstance that the date for the expiration of our order falls on the 9th day of the month, while services are normally ordered on the 15th for service on the first day of the next month. For this reason, we will modify our order to provide that the revised tariff schedules may become effective May 1, 1967. We are not impressed by the fears expressed by the railroads based on their speculation as to what may be entailed in the way of plant replacement when the revised tariff schedules are filed. It should be borne in mind that such revised schedules will not cause the loss of any existing service, even though such service may be priced differently.

ACCORDINGLY, IT IS ORDERED, that effective December 28, 1966, that:

- (1) Paragraph 3 of our Order of November 10, 1966, is hereby amended by deleting from the first sentence, paragraph thereof the words "effective on 30 days notice" and substituting therefor the words "effective May 1, 1967."
- (2) The petitions for reconsideration are GRANTED to the extent indicated and in all other respects ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple

Ben F. Waple
Secretary

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

195 BROADWAY, NEW YORK, N. Y. 10007

F. MARK GARLINGHOUSE
VICE PRESIDENT

AREA CODE 212 393-1000

January 9, 1967

Mr. Ben F. Waple, Secretary
Federal Communications Commission
New Post Office Building
Washington, D. C. 20554

Re: Docket No. 16258

Dear Sir:

In compliance with the Telephone Committee's Order released November 25, 1965 (FCC 66M-1582), we are filing herewith and distributing our rate proposals for the TELPAK C and D services, together with revised cost data relating to those services. A statement setting forth these rate proposals and cost data is enclosed.

As pointed out in the enclosed statement, we propose that these rate changes for TELPAK C and D should not become effective until the latter part of 1967. It is expected that additional supporting detail will be furnished at the time revised tariff schedules are filed.

Concurrently with the filing of the enclosed statement and pursuant to the Commission's Memorandum Opinion and Order, in Docket No. 14251, released November 10, 1966 (FCC 66-1005), as amended by its Memorandum Opinion and Order released December 28, 1966 (FCC 66-1188), American Telephone and Telegraph Company is filing revised tariff schedules relating to various private line services. Generally, these tariff filings, to be effective May 1, 1967, provide for (1) elimination of the TELPAK A and B classifications, (2) restructuring of the rates for certain private line telephone grade services, (3) increases in the rates for certain private

Mr. Ben F. Waple, Secretary

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line telegraph grade services, and (4) offering a new wideband service (series 8000 channels) providing transmission capacities equivalent to a maximum carrier spectrum of approximately 48 kilocycles per second for high speed data and facsimile transmission and for alternate voice use.

Copies of this letter and of the enclosed statement are being transmitted to members of the Telephone Committee and to all others on the service list of this proceeding and on the service list of Docket No. 14251.

Respectfully yours,

F. Mark Garlinhouse
Attorney for
Bell System Respondents

Encs.

F.C.C. Docket No. 16258
January 9, 1967

STATEMENT OF BELL SYSTEM RESPONDENTS

Proposed Rates and Revised Cost Data
for TELPAK C and D

The Bell System Respondents, in compliance with the Order of the Telephone Committee released November 25, 1966 (FCC 66M-1582), submit the following rate proposals and revised cost data for TELPAK C and D services and channels.

Attachment A is a schedule showing the present and proposed rates for principal items of TELPAK C and D services and channels. Contemporaneously with the submission of this statement, A.T.&T. is filing, pursuant to the Commission's Order in Docket No. 14251, released November 10, 1966 (FCC 66-1005), as amended by its Memorandum Opinion and Order released December 28, 1966 (FCC 66-1188), tariff revisions to be effective May 1, 1967, which unify the rates for TELPAK A and B with the rates for other private line services. That filing involves the elimination of TELPAK A and B. The proposals included in this statement represent substantial increases in the rates for TELPAK C and D.

Respondents recognize, of course, the difficulties that present TELPAK customers will encounter in evaluating

their communications requirements and restructuring their communications networks, in light of the rate increases proposed in this statement and of the elimination of TELPAK A and B. These customers should be afforded adequate time to make the necessary rearrangements. Under these circumstances, Respondents propose that these changes in the rates for TELPAK C and D should not become effective until the latter part of 1967.

The considerations underlying these rate proposals for TELPAK C and D are reviewed below.

Experience with the market development of TELPAK has shown that a substantial increase in the level of the rates for TELPAK C and D is necessary. With respect to the relative demand for the respective TELPAK base capacities (A, B, C, and D), the average fill of these base capacities (i.e., the extent to which, on the average, customers utilize these capacities for equivalent voice grade channels), and other patterns of customer use of these services, the market has not developed as anticipated when TELPAK was introduced. For example, the composition (mix) of the present TELPAK market does not conform with the relative proportions of TELPAK A, B, C, and D that were originally forecast, and the existing levels of average base capacity fills, especially with respect to TELPAK D, have exceeded those initially estimated.

Had the TELPAK market developed in a manner consistent with the forecast of the bulk communications market made at the time TELPAK was introduced, the TELPAK services at their present rate levels should have been making a significant contribution to the overall earnings from the interstate services. But the market has not so developed, and the actual pattern of the market development has had a significant effect on the relationship of revenues and costs for the TELPAK services. These circumstances, taking into account changes related to technology and operations, have required a reevaluation of the level and structure of charges for the TELPAK services.

Furthermore, the elimination of the TELPAK A and B classifications changes the general nature of the TELPAK offering and has a significant effect on the cost-revenue relationships for this service category. With TELPAK A and B discontinued, the evaluation of the surviving TELPAK services must be based on market and cost considerations that are materially different from those that are applicable when the TELPAK A and B classifications are included in the offering.

A brief review of the characteristics of the TELPAK offering can be helpful in understanding the nature of the problems involved in developing cost-revenue relationships with respect to the surviving TELPAK services.

There are two essential components of the TELPAK offering: base capacity (line haul) and channel terminals. Both are required to provide service. The classifications A, B, C, and D apply only to the base capacity component. Channel terminals are not so classified. They have the same cost characteristics and are furnished at the same charge whether they are parts of individual channels included in A, B, C, or D base capacities, or in two or more such classifications of base capacity.

It is characteristic of the TELPAK offering that the same customers require TELPAK base capacities in more than one of the classifications offered (A, B, C, and D) and that individual channels of voice grade or telegraph grade will traverse two or more TELPAK sections of differing base capacities. In such systems, the channel terminals provided for individual channels cannot be considered as attributable to any one section of a particular base capacity. Thus it is not possible to classify the revenues and costs for channel terminals among the classifications of TELPAK base capacity, whether there are four (A, B, C, and D) or only two (C and D).

With an understanding of the foregoing it can be seen that operating results (whether in the overall or with an attempt at fragmentation) for a TELPAK market which includes A, B, C, and D base capacities with a totality of .

channel terminals do not furnish a basis for evaluating cost-revenue relationships for a market which includes only TELPAK C and D. For this purpose, estimates of costs and revenues associated with a near-future market for the surviving TELPAK services, that is, with only C and D base capacities offered, provide the more significant guides for determining appropriate rate levels. This is the approach followed in the cost analyses presented herewith (Attachment B).

There is a further problem inherent in the development of costs for TELPAK C and D base capacities and for channel terminals. Because of the integrated nature of TELPAK systems and the interaction of cost elements as between line haul and terminal, it is not practicable to isolate each cost element and attribute its incurrence specifically to either the line haul (base capacity) or the channel terminal. Thus, any cost breakdown between line haul and terminal is at best an approximation. For these reasons, the best approach to an evaluation of cost-revenue relationships is a consideration of the costs associated with a given TELPAK market in total with the total revenues from that market.

In reviewing the present rate levels for TELPAK C and D, a comparison was made between estimates of the relevant unit costs for the surviving components of the TELPAK

offering and the corresponding rates. Based on average base capacity fills in the mid-1965 market, for example, the full additional costs for the TELPAK C base capacity are about \$18 per mile compared to an existing rate of \$25 per mile, and the full additional costs for TELPAK D base capacity are about \$69 per mile compared to an existing rate of \$45 per mile. Moreover, the trend of the unit costs for the base capacity components is upward since the average fills, particularly for TELPAK D, are rising. The full additional costs for voice-grade channel terminals are about \$37 1/2 per main terminal compared to average revenues of about \$16 per main terminal (including revenues from additional terminals). In addition, the relevant costs attributable to the telegraph services furnished under the TELPAK tariff, taking into account the relatively high costs of terminals and associated arrangements for these services, have not been covered on the basis of the present 1-to-12 telephone/telegraph equivalency provided in the TELPAK tariff.

The various considerations outlined above make it necessary to propose substantial changes in the rate level and structure for the surviving TELPAK services. The proposed rates for TELPAK C and D, set forth in Attachment A, represent the best judgment of Respondents as to a rate level and structure that will cover the

relevant costs, will make a significant contribution to overall interstate earnings, and will be appropriate when market and other ratemaking factors, including competition with customer-provided communications systems, are taken into consideration. The major principles and factors applicable in setting rates have been reviewed in the testimony of Mr. Gordon N. Thayer (Bell Exhibit 23) previously distributed in this proceeding.

Attachment B is a summary of cost analyses for TELPAK C and D made on the basis of an estimated market as of the end of 1968. This market has been estimated for the surviving TELPAK services under the rates proposed in Attachment A. As shown in Attachment B (pages 1-3), the full additional costs are estimated to be about \$201.5 million per year and revenues under the proposed rates are estimated to be about \$239 million per year. Using the net booked investment for the equipment items usable only for the telegraph services furnished under the TELPAK tariff, the costs for TELPAK C and D are estimated to be about \$204 million per year (Attachment B, pages 4-6).

These cost analyses have been designed to determine the relevant cost data needed in the process of reaching ratemaking decisions with respect to the surviving TELPAK services. The concepts and approach involved in the cost analysis work have been discussed in the

testimony of Mr. Albert M. Froggatt (Bell Exhibits 24 and 24A) which has already been distributed in this proceeding.

Moreover, the significant cost and investment data in Attachment B are those that are presented in the "Total" columns. In view of the characteristics of the TELPAK offering, as explained above, TELPAK C and D are not distinguishable as separate service categories. However, since the Commission in its Order released November 10, 1966, has indicated a separation of TELPAK C and TELPAK D, Attachment B shows an approximate breakdown of TELPAK revenues and costs among: TELPAK C line haul (base capacity), TELPAK D line haul (base capacity), and channel terminals. For the reasons given above, it is not feasible to show a two-part breakdown, that is, to treat TELPAK C and D as separate service categories and to assign the costs and revenues for the channel terminals as between these two categories.

January 9, 1967

TELPAK C and D Services and Channels

Present and Proposed Monthly Rates

Principal Items

	<u>Present</u>	<u>Proposed</u>
<u>Interexchange Channels - per airline mile</u>		
TELPAK C Base Capacity	\$ 25.00	\$ 30.00
TELPAK D Base Capacity	45.00	85.00
<u>Channel Terminals - per terminal */</u>		
Voice or teletypewriter:		
First terminal	\$ 15.00	\$ 35.00
Additional	5.00	15.00
<u>Telephone/Telegraph Equivalency</u>	1 to 12	1 to 2

*/ To be designated "service terminal."

January 9, 1967

TELPAK ServicesSummary of
Analysis of Full Additional Costs
(Estimated 1968 Market at Proposed Rates)

	Thousands of Dollars			
	Line Haul		Channel Terminals	Total
	TELPAK C	TELPAK D		
1. Additional Net Investment	139,400	236,000	212,900	588,300
2. Operating Expenses and Taxes (other than Federal Income Taxes)	27,300	44,500	47,300	119,100
3. Federal Income Taxes ^{*/}	8,400	14,200	12,800	35,300
4. Amount for Return (8% of Line 1)	11,100	18,900	17,000	47,000
5. Annual Full Additional Costs (Sum of Lines 2, 3, and 4)	46,800	77,600	77,100	201,400
6. Annual Revenues	80,200	83,200	75,300	238,700

NOTE: May not add because of rounding.

^{*/} Federal income taxes determined on basis of 48%
tax rate applied to taxable income that would
yield 8% on additional net investment.

January 9, 1967

TELPAC Services

Summary of Investment Data Based on
Analysis of Full Additional Costs
(Estimated 1968 Market at Proposed Rates)

	Thousands of Dollars			
	Line Haul		Channel Terminals	Total
	TELPAC C	TELPAC D		
Outside Plant - Interexchange	27,500	45,400	-	72,900
Outside Plant - Exchange	-	-	36,700	36,700
Central Office Circuit Equipment	54,000	91,400	146,600	292,000
Central Office Radio Equipment	39,100	66,800	-	105,900
Station Equipment	-	-	25,000	25,000
Land	1,700	2,900	2,000	6,600
Buildings	25,400	43,400	19,300	88,100
General Items - Vehicles and Other Work Equipment, Furniture and Office Equipment, etc.	3,200	5,400	6,100	14,800
Other Additional Investment - Plant Under Construction, Cash Working Capital, Materials and Supplies, Miscellaneous Investment	<u>23,300</u> 174,300	<u>39,600</u> 294,900	<u>28,200</u> 264,100	<u>91,200</u> 733,200
Less: Depreciation Reserve	<u>34,900</u>	<u>58,900</u>	<u>51,200</u>	<u>144,900</u>
Additional Net Investment	<u>139,400</u>	<u>236,000</u>	<u>212,900</u>	<u>588,300</u>

NOTE: May not add because of rounding.

January 9, 1967

TELPAK Services

Summary of Data on Operating Expenses
and Taxes (other than Federal Income Taxes)
Based on Analysis of Full Additional Costs
(Estimated 1968 Market at Proposed Rates)

	Thousands of Dollars			
	<u>Line Haul</u>		<u>Channel</u>	
	<u>TELPAK C</u>	<u>TELPAK D</u>	<u>Terminals</u>	<u>Total</u>
Expenses for Maintenance (except Testing), Depreciation, Traffic, Revenue Accounting, Property Taxes, General Departments, Commercial, Advertising and Miscellaneous	22,700	37,400	36,800	96,900
Testing Expenses	4,800	7,500	10,500	22,900
Gross Receipts Taxes	300	500	500	1,400
Other State and Local Taxes	<u>400</u>	<u>600</u>	<u>600</u>	<u>1,600</u>
	28,200	46,100	48,400	122,700
Less:				
Other Income - Interest During Construction, Interest on Temporary Investments, etc.	<u>900</u>	<u>1,600</u>	<u>1,100</u>	<u>3,600</u>
Total Operating Expenses and Taxes (other than Federal Income Taxes)	<u>27,300</u>	<u>44,500</u>	<u>47,300</u>	<u>119,100</u>

NOTE: May not add because of rounding.

January 9, 1967

TELPAK Services

Summary of Analysis Using Net Booked
Investment for Equipment Items
Usable Only for Telegraph Service
(Estimated 1968 Market at Proposed Rates)

	Thousands of Dollars			
	Line Haul		Channel Terminals	Total
	TELPAK C	TELPAK D		
1. Net Investment	139,400	236,000	222,300	597,700
2. Operating Expenses and Taxes (other than Federal Income Taxes)	27,300	44,500	48,700	120,500
3. Federal Income Taxes ^{*/}	8,400	14,200	13,300	35,900
4. Amount for Return (8% of Line 1)	11,100	18,900	17,800	47,800
5. Annual Costs (Sum of Lines 2, 3, and 4)	46,800	77,600	79,800	204,200
6. Annual Revenues	80,200	83,200	75,300	238,700

^{*/} Federal income taxes determined on basis of 48% tax rate applied to taxable income that would yield 8% on additional net investment.

January 9, 1967

TELPAK Services

Summary of Investment Data Based on Analysis
Using Net Booked Investment for Equipment Items
Usable Only for Telegraph Service
(Estimated 1968 Market at Proposed Rates)

	Thousands of Dollars			
	Line Haul		Channel Terminals	Total
	TELPAK C	TELPAK D		
Outside Plant - Interexchange	27,500	45,400	-	72,900
Outside Plant - Exchange	-	-	36,700	36,700
Central Office Circuit Equipment	54,000	91,400	155,400	300,800
Central Office Radio Equipment	39,100	66,800	-	105,900
Station Equipment	-	-	25,000	25,000
Land	1,700	2,900	2,200	6,700
Buildings	25,400	43,400	20,500	89,300
General Items - Vehicles and Other Work Equipment, Furniture and Office Equipment, etc.	3,200	5,400	6,300	14,900
Other Investment - Plant Under Construction, Cash Working Capital, Materials and Supplies, Miscellaneous Investment	23,300	39,600	29,500	92,400
	174,300	294,900	275,600	744,700
Less: Depreciation Reserve	34,900	58,900	53,300	147,100
Net Investment	139,400	236,000	222,300	597,700

NOTE: May not add because of rounding.

January 9, 1967

TELPAK Services

Summary of Data on Operating Expenses and Taxes
 (other than Federal Income Taxes)
 Based on Analysis Using Net Better Investment
 for Equipment Items Usable Only for Telegraph Service
 (Estimated 1968 Market at Proposed Rates)

Thousands of Dollars				
	<u>Line Haul</u>		<u>Channel</u>	
	<u>TELPAK C</u>	<u>TELPAK D</u>	<u>Terminals</u>	<u>Total</u>
Expenses for Maintenance (except Testing), Depreciation, Traffic, Revenue Accounting, Property Taxes, General Departments, Commercial, Advertising and Miscellaneous	22,700	37,400	38,200	98,300
Testing Expenses	4,800	7,500	10,500	22,800
Gross Receipts Taxes	300	500	500	1,400
Other State and Local Taxes	400	600	600	1,600
	<u>28,200</u>	<u>46,900</u>	<u>49,900</u>	<u>124,200</u>
Less:				
Other Income - Interest During Construction, Interest On Temporary Investment, etc.	<u>900</u>	<u>1,600</u>	<u>1,200</u>	<u>3,700</u>
Total Operating Expenses and Taxes (other than Federal Income Taxes)	<u>27,300</u>	<u>44,500</u>	<u>48,700</u>	<u>120,500</u>

NOTE: May not add because of rounding.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 63M-130
11695

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
and the Associated Bell System Companies

Charges for Interstate and Foreign
Communication Service

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

Charges, Practices, Classifications, and
Regulations for and in Connection with
Teletypewriter Exchange Service

DOCKET NO. 15011

MEMORANDUM OPINION AND ORDER

Adopted : January 23, 1968

Released : January 23, 1968

1. A Petition for "Clarification of Issues" was filed with the Telephone Committee on October 27, 1967, by American Newspapers Publishers Association, the Associated Press, and Twin Coast Newspapers, Inc. A statement in support of the petition was filed on November 7, 1967, by United Press International, Inc., and "Comments" were filed by the Bell System Respondents. A reply to the comments was filed on November 9, 1967, by petitioners.

2. Petitioners point to the fact that, in the present phase of this proceeding, AT&T and the Bell System Respondents have proposed increases in interstate charges for certain categories of private line services. These relate to existing TELPAK C and D services, to charges for telegraph terminal equipment in connection with private line telegraph services, and to program transmission rates. Petitioners also assert that Respondents anticipate subjecting press customers to substantially higher commercial rates. With the exception that certain increases became effective August 1, 1967, and the increases in private line charges for telegraph terminal equipment have been filed but are not scheduled to become effective until August 1, 1968, the other proposed increases have not yet been incorporated in tariff filings. Respondents have stated on the record, however, that appropriate tariffs will shortly be filed to become effective April 1, 1968.

[illegible]

7. In consolidating Docket No. 17021 with this proceeding, the Commission notes that the DMX notes being approved on an interim basis would be given final disposition in this proceeding.

6. On January 9, 1967, Respondents filed appropriate tariffs concerning TELPAK A and B rates, and made certain other adjustments, as set forth in the Order adopted July 26, 1967 (FCC 67-395). All of these rates became effective August 1, 1967, except as to private line teletypewriter station equipment, which will become effective August 1, 1968. Respondents also notified the Commission, on the same date, of the details of its proposals to increase TELPAK C and D and program transmission rates, and these are shortly to be filed in tariff form. Appropriate notice has been taken in this proceeding of the latter notifications. The cost data, with some modifications, have now been formally submitted in this record as Attachment C to Bill Ex. No. 241, the testimony of witness Froggatt. Details of the proposals are of record herein and the primary cost and marketing data submitted by Respondents with respect to these two categories of services are related to the proposed rates rather than current rates.

7. In the current hearings Respondents are submitting evidence concerning their general rate-making principles and policies. They are also submitting detailed evidence as to cost, marketing, and competitive considerations related to the proposed increased rates for TELPAK C and D and program transmission services, as well as to existing rates for other services. It cannot be determined at this time, of course, whether these proposed rates are just and reasonable but their imminent filing will, no doubt, bring them into issue in another proceeding.

8. In the present phase of this proceeding, and as part of any finding made with respect to rate-making principles and factors, we may consider the revenue requirements of each class of service. "If we should find that any class of service shows a deficiency of earnings, that there is no longer an adequate showing of continued competitive necessity, or if the record should otherwise require adjustment in rates, then it would appear that Respondents should be directed to file appropriate tariffs to give effect to those findings." This has undoubtedly been anticipated by Respondents by the announcement of the filing of the increased program transmission and TELPAK rates which were deficient in earnings under Petitioner's own criteria. Petitioners, or any other party, may, of course, petition for suspension or file formal complaint under the Commission rules against those tariff filings when they are submitted.

9. While we did not originally contemplate consideration of any specific rates in this proceeding, intervening events have modified the situation. Thus, Respondents have offered evidence herein on a broad economic theory of pricing, together with a practical translation of that theory into detailed cost and market studies. Those studies, in turn, are tied to certain rate changes deemed by Respondents to be necessary in the light of their examination of rate-making principles. Any meaningful consideration of the rate-making principles here in issue thus requires consideration of the price changes as well as the extensive cost and marketing

1. 在 1950 年 10 月 1 日以前，凡在中华人民共和国领域内，
 2. 从事生产、经营、管理、服务等活动的单位和个人，
 3. 均须遵守本条例的规定。
 4. 本条例自 1950 年 10 月 1 日起施行。

ACCIDENT, IN THE COURT OF

2. Petitioner's request for the right to the President's oath of office testimony and the right to the Respondent's proposed testimony and, as discussed herein, is denied.

2. The other request is for a letter to the effect:

THE UNIVERSITY OF CHICAGO
CHICAGO, ILLINOIS

1. 1. The first part of the paper is a review of the literature on the topic of the paper.
 2. 2. The second part of the paper is a description of the methodology used in the study.
 3. 3. The third part of the paper is a presentation of the results of the study.
 4. 4. The fourth part of the paper is a discussion of the results of the study.
 5. 5. The fifth part of the paper is a conclusion.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
LONG LINES DEPARTMENT

Revisions of Tariff F.C.C. No. 260,
Private Line Telegraph Grade Services,
Series 5000 (TELPAK)

File No. _____

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
and the Associated Bell System Companies

Charges for Interstate and Foreign
Communication Service

Docket No. 16258

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

Charges, Practices, Classifications, and
Regulations for and in Connection with
Teletypewriter Exchange Service

Docket No. 15011

Before: The Commission En Banc

PETITION TO REJECT OR REQUIRE WITHDRAWAL OF PROPOSED
INCREASES IN TELPAK RATES

Comes now the Air Transport Association of America (ATA),
a party intervenor in Docket No. 16258, by its counsel, and pursuant to
the provisions of the Communications Act of 1934, as amended, and the

Administrative Procedure Act, respectfully petitions that the Commission reject or require the withdrawal of proposed increases in the rates for TELPAK C and D services, announced by the General Counsel for the American Telephone and Telegraph Company on January 22, 1968, in Docket No. 16258,^{1/} to be filed on or about January 31, 1968, to be effective on or about April 1, 1968, and that the Commission grant such further relief as to the Commission may seem just and proper in the premises.

This is no routine tariff protest looking toward suspension and investigation. On the contrary, somewhat unusual relief must be fashioned to fit the unusual facts and unique procedural situation. Otherwise, not only will due process be denied to the Petitioner and other parties but the integrity of the Commission's procedures will be jeopardized.

In support hereof, Petitioner ATA respectfully states as follows:

I. Standing of Petitioner

1. The Air Transport Association of America is an unincorporated non-profit association composed of common carrier members constituting virtually all of the United States flag lines authorized and required under certificates of the Civil Aeronautics Board to provide regularly scheduled air transportation over established routes. As a principal objective, it is engaged in the promotion and development of air transportation to meet the present and future needs of the foreign and domestic commerce of the United States, the postal service, and the national defense.

^{1/} Tr. Vol. 110, pp. 14384-85. Intention to file as previously announced, notwithstanding requests to defer filing, was reaffirmed by AT&T counsel at the hearing conference of January 29, 1968.

2. The airline industry, a regulated industry licensed to operate in the public interest, is a major dynamic force in the American economy. In 1967, 47 scheduled United States carriers, with 2,195 aircraft in service, flew 133.6 million passengers, 99.3 billion passenger miles, 2.4 billion freight ton miles, 971 million U.S. Mail ton miles, and 104 million express ton miles. The airlines averaged over 12,600 scheduled daily flights during 1967, serving over 700 domestic and international points, and took delivery of 387 new jet and turboprop aircraft valued at \$2.1 billion during the year. It is projected that by 1975, the airlines will be flying 300 million passengers and 10 million ton miles of cargo, a three-fold increase in passengers and cargo, at speeds of 2,200 miles an hour.

3. Essential to the operations of the airline industry and its continuing growth is the availability of "a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges".^{2/} The air transportation industry's communications system includes, among other facilities, 2 million circuit miles of leased telephone, teletype, and data transmission lines and connecting equipment, costing approximately \$100 million in charges in 1966, and approximately \$250 million in data processing equipment currently owned or leased for passenger reservation requests. The industry is the largest private user of TELPAK services, second only to the United States Government among all users, with more than 33,000 miles of TELPAK circuitry.

4. ATA vigorously participated in the TELPAC Case, Docket No.

^{2/} Section 1 of the Communications Act of 1934, as amended, 47 U.S.C. §151.

14251, before the Commission and the United States Court of Appeals for the District of Columbia Circuit, and on petition for certiorari before the Supreme Court of the United States. It was an early intervenor in the pending AT&T General Rate Investigation, Docket No. 16258, and in the pending TELPAC Sharing Provisions Case, Docket No. 17457.

5. The member companies of ATA would be most substantially and seriously aggrieved and adversely affected as parties in interest if the Commission fails to reject or require the withdrawal of the proposed rate increases in TELPAK C and D. It is estimated that the charges for TELPAK service to the airline industry, under present sharing provisions, would increase 132%, or approximately \$25 million per year, if such rate increases were to become effective.

II. Statement of Essential Facts

A. The TELPAK Case Was Folded Into The AT&T General Rate Investigation, On The Single Issue Whether The Current TELPAK C and D Rates Are Compensatory

6. In the tentative decision in the TELPAK Case,^{3/} the Commission stated:

"There is apparent justification for TELPAK C and D classifications in terms of meeting competition from private microwave systems having channel capacities comparable to those offered by such TELPAK classifications. However, we are unable to determine on this record that the rates for TELPAK C and D classifications are compensatory in relation to the cost of furnishing the services offered thereunder, and, therefore, are unable to find that the other users of A.T. & T. services will benefit and not be burdened by the application of such rates."

^{3/} Docket No. 14251, 38 F.C.C. 370, 395 (1964).

7. In the final TELPAK decision,^{4/} the Commission expressly adopted these findings and conclusions "that although C and D TELPAK would otherwise be justified by competitive necessity, they have not been shown to be compensatory," and stated that from the cost studies being conducted by AT&T of its various services "it should be possible to develop from these cost studies more positive data relating to the cost of furnishing TELPAK C and D." The record was ordered reopened for this limited purpose, and AT&T was directed to "submit for the record in this proceeding additional cost data on the basis of which the Commission may determine whether or not the existing rates for TELPAK C and D are compensatory, together with such revised tariff schedules as may be indicated by such data * * * *"

(Emphasis added).

8. This disposition of TELPAK C and D was recognized by the United States Court of Appeals for the District of Columbia Circuit on appeal:^{5/}

"Upon consideration the Commission concluded that the Telpak C and D rates were justified by competition, and this conclusion necessitated a determination as to whether these rates were compensatory, that is, whether they would bear their own costs or would be a burden on other customers of the Company. * * * Upon completion of these inquiries the Commission was unable to determine whether the C and D rates would sustain the burden of their own costs and thus supply a justification of the difference between those rates and the rates charged other customers. * * *" (Emphasis added).

^{4/} 37 F.C.C. 1111, 1117-18 (1964).

^{5/} American Trucking Associations, Inc. v. Federal Communications Commission 377 F. 2d 121, 129 (U.S. App. D.C., 1966), certiorari denied 386 U.S. 943 (1967).

9. After disposition on appeal, the Commission by Memorandum Opinion and Order^{6/} ordered the TELPAK proceeding terminated upon the filing of revised tariff schedules disposing of TELPAK A and B's unlawful discrimination, incorporated the TELPAK record into Docket No. 16258, and amended the issues in Docket No. 16258 to include a determination whether the current charges for TELPAK C and TELPAK D are just and reasonable. On petition for partial reconsideration and modification, various intervenors, including the airline group, averred that the remaining issue with respect to TELPAK C and D should be reserved for determination in the existing Docket No. 14251. Rejecting this argument, the Commission twice emphasized in a Memorandum Opinion and Order on reconsideration^{7/} that the only issue with respect to TELPAK C and D was whether existing rates are compensatory:

"12. The Commission, in amending its Order of October 27, 1965, in Docket No. 16258 (FCC 65-959) to include a consideration of TELPAK's C and D within that docket, was mindful of the fact that the only remaining issue with respect to TELPAK C and D was whether the existing rates were compensatory. This issue deals with the over-all level of earnings for the services and does not relate to a detailed analysis of the specific rates involved. Accordingly, since Docket No. 16258 contains within it the issues of the proper rate of return and the relationships of the level of earnings of the different classes of services, it is the proper proceeding within which to determine the compensatory nature of TELPAK C and D and their relationship to the other services.

"13. * * * As we have previously stated, the only issue remaining with respect to TELPAK C and D is whether the rates are compensatory. As stated in paragraph 12 hereof, this issue deals with the over-all level of earnings and does not relate to a detailed analysis of the specific rates involved, and is therefore appropriate for determination in Docket No. 16258." (Emphasis added.)

^{6/} FCC 66-1005, 7 F.C.C. 2d 30, released November 10, 1966.

^{7/} FCC 66-1188, 6 F.C.C. 2d 177, released December 28, 1966.

10. As recently as the Telephone Committee's Memorandum Opinion and Order of January 23, 1968,^{8/} in Docket No. 16258, it was again recognized that:

"In denying petitions for reconsideration of that Order [FCC 66-1005], it was noted that the sole remaining issue with respect to Telpak C and D is whether those rates [the present Telpak C and D rates] are compensatory (6 FCC 2d 177)." (Emphasis added.)

On the following day, in answer to a specific inquiry by the Petitioner during the course of the hearing in Docket No. 16258, the Presiding Examiner affirmed his understanding that the issue whether present TELPAK C and D rates are compensatory "definitely" would continue to be tried in that proceeding.^{9/}

B. The Undetermined Status In Docket 16258 Of The Issue of The Compensatory Character of Present Telpak C and D Rates

11. In testimony in Docket No. 16258, AT&T witnesses have conceded, among other things, that to the date of their testimony TELPAK revenues have apparently covered the costs incurred because of TELPAK;^{10/} that TELPAK has been a new service requiring new plant;^{11/} that the greatest economies of scale have occurred in AT&T's interexchange plant, and that such plant

^{8/} 68M-130, released January 23, 1968.

^{9/} Tr. Vol. 112, pp. 15068-69.

^{10/} Tr. Vol. 77, p. 10,590.

^{11/} Tr. Vol. 77, p. 10,572.

constitutes about 90 per cent of the facilities needed to provide TELPAK service;^{12/} that the basic network routes of AT&T utilized by TELPAK, such as the transcontinental coaxial cable, would have been and have been installed without regard to TELPAK requirements;^{13/} that because of direct, unregulated competition from private microwave, if TELPAK rates are well above what the customer can in effect do for himself, they would be "paper rates" only;^{14/} and that the proposed TELPAK D rates are generally more than twice the costs of comparable private microwave.^{15/}

12. Thus AT&T's own incomplete evidence in the record of Docket No. 16258 strongly indicates that present TELPAK C and D rates are compensatory. It is true that AT&T claims that TELPAK revenues at present rates would not cover full additional costs in the future.^{16/} While it may be hard to believe, its witness has at the same time conceded that AT&T has studied only alternative proposed rates, and that it has not made a market and cost study to determine whether projected revenues under present rates would cover full additional costs,^{17/} although it is recognized by AT&T's economic experts that TELPAK C and D are apparently price elastic,^{18/} which

^{12/} Bell Ex. 24, pages 13-14; Tr. Vol. 80, p. 11,085.

^{13/} Tr. Vol. 80, p. 11,077-78.

^{14/} Tr. Vol. 77, p. 10,559; Tr. Vol. 94, pp. 12,887-88.

^{15/} Tr. Vol. 110, p. 14,895-97; See pages 3, 4, 5, of Comparative Telpak D - Average Private Micro Wave Costs furnished by AT&T at request of Petitioner herein, attached hereto as Exh. A.

^{16/} Tr. Vol. 77, p. 10,590.

^{17/} Tr. Vol. 94, pp. 12913-14

^{18/} Tr. Vol. 100, pp. 13684, 13697. Dr. Baumol, an AT&T economic expert witness, has testified that the existence of direct competition from substitute facilities [as characterized by the relationship of private microwave and TELPAK] is "the best evidence in the world" that the Bell System services are elastic demand services. Tr. Vol. 100, p. 13709.

means that ordinarily greater net revenues would be realized from the lower level of rates. Furthermore, the present Petitioner and other parties have not yet had the opportunity to complete the cross-examination of AT&T witnesses, much less to proffer their own evidence and witnesses to demonstrate that the present Telpak C and D rates are compensatory.

13. To permit AT&T now to file substantial increases in Telpak C and D rates when the basic, if not sole, issue with respect to such present rates is undetermined, would necessarily subvert that very issue. The Petitioner and other parties are entitled to have a determination of the issue which they have thus been litigating. It is submitted that only if the present rates are found by the Commission to be non-compensatory after completion of the present hearing, may new and greatly increased Telpak C and D rates be filed for tariff effectiveness.

C. To Permit The Tariff Filing of A Rate Increase For One Whole Class Of Service (Telpak C and D) At This Time Would Violate Not Only The Letter and Spirit Of All Prior Orders In Docket 16258 But Also The Commission's Settled Policy Against Fragmentation Of Such A Proceeding

14. The AT&T General Rate Investigation of Docket No. 16258 represents the first formal review in the history of the Commission of the charges for all interstate communication services of the Bell System. Critical aspects of that review are now being investigated in Phase I-B of the proceeding, which is concerned with rate-making principles and factors, and

their application to rate relationships and the level of rates among the various classes of service. The Commission has consistently emphasized that having determined the total revenue requirements of AT&T in Phase I-A, it is now concerned with "the relevant ratemaking principles and factors that shall control in the distribution of such revenue requirements among respondents' principal rate classifications," i.e., with "the variation in the level of earnings for the different classes of services, and not with the internal rate components, practices, or regulations within each of the principal rate classifications of service." ^{19/} (Emphasis added).

15. In its Memorandum Opinion and Order implementing the TELPAK decision, FCC 66-1005, released November 10, 1966, the Commission stated that "respondents' additional cost data as to TELPAK C and D, being required to be filed in Docket No. 16258, may be accompanied by 'proposed' changes in those rates." AT&T complied with this authorization by filing on January 9, 1967, "proposals" for new rate increases for TELPAK C and D, assertedly justified by cost considerations. The Commission also cautioned, however, "We do not wish such specific rate issues to become part of the more general issues of Docket No. 16258. Accordingly, when such tariff filings are made, if need therefor arises, it is expected that those issues will be examined in a separate docket." (Emphasis added).

^{19/} AT&T Revision of Definition of Service Points, FCC 66-71, 2 F.C.C. 2d 359, 360-61, released January 26, 1966; Sports Networks, Inc. v. A.T. & T., FCC 66-403, 3 F.C.C. 2d 618, 624, released May 4, 1966, FCC 67R-62, released February 24, 1967; TELPAC Case, FCC 66-1005, released November 10, 1966, FCC 66-1188, released December 28, 1966; TELPAC Sharing Provisions, FCC 67-612, released May 19, 1967.

16 . The Commission necessarily contemplated that such "proposals" would not become "tariff" filings, however, until after its consideration of the issues within Phase I-B was completed, because it manifestly is not possible to determine rate structures, and the details of internal rate components or regulations within a class of service, until the controlling rate-making principles for, as well as the revenue requirements of, that class of service, are determined. A fortiori, this would be true in the case of the reopened, remanded and relitigated issue of the compensatory character of the present Telpak C and D rates.

17. Sometime ago the Commission determined, in Docket No. 16072,^{20/} that it would not give consideration to rate changes, particularly rate increases, even within a class of service, where they depend upon necessary determinations in Docket No. 16258, until the underlying rate-making issues have all been resolved:

"We recognize, however, as A.T. & T. points out that the resolution of certain issues in docket No. 16258 would be useful, if not essential, to the resolution of the basic issues in docket No. 16072. Thus, in docket No. 16258, it may be expected that the revenue requirements of A.T. & T. for private line service will be determined. It is within such overall revenue requirements that the lawfulness of the channel terminal charges at certain points which is at issue could very well be determined. Consequently, we believe that public hearings in this proceeding should be deferred until such time as a determination of such revenue requirements for the private line services involved shall have been made. * * *

^{20/} Revision of Definition of Service Point in Connection with Private Line Services and Channels, 2 F.C.C. 2d 358, 361 (1966).

Similarly, in the Private Line Case, Docket No. 11645,^{21/} the Commission refused to fragmentize a proceeding to consider particular rate increases where it was already considering in another proceeding the general, over-all level of rates for the more general class service:

"* * * Any determination made by the Commission with respect to the lawfulness of private line teletypewriter rates as contemplated by the aforementioned issues of the general investigations, as well as with respect to the 'interim' rates under suspension, obviously involve the consideration of cost data and other evidence going to questions of rate levels and rate structure common to both determinations. This is also true with respect to the determination of just and reasonable rates applicable to A.T.& T.'s private line telephone services which involve cost and rate structure considerations which, in large measure, are inseparable from considerations pertinent to the determination of teletypewriter rates. We do not see how it would be realistic and conducive to an expeditious determination of the issues herein to attempt to fragmentize the proceeding in these respects even if it were possible to do so. In our opinion, the best interests of the private line users and the respondent carriers will be served by developing a full and complete record on costs and rate structure applicable to all private line services in issue * * * *." (Emphasis added.)

18. In its Memorandum Opinion and Order^{22/} in Docket No. 16258 released January 23, 1968, the Telephone Committee has said:

"In the current hearings Respondents are submitting evidence concerning their general rate-making principles and policies. They are also submitting detailed evidence as to cost, marketing, and competitive considerations related to the proposed increased rates for TELPAK C and D and program transmission services, as well as to existing rates for other services. It cannot be determined at this time, of course, whether these proposed rates are just and reasonable but their imminent filing will, no doubt, bring them into issue in another proceeding." (Emphasis added.)

^{21/} 26 F.C.C. 101, 103 (1959).

^{22/} FCC 68M-130.

In any other fragmented proceeding, however, the issue whether these proposed rates are just and reasonable cannot be reasonably, properly or sensibly adjudicated without knowing first, by a determination in Docket No. 16258, what rate-making principles, factors and relationships must be considered and applied as a prerequisite to a Commission determination of the revenue requirements of TELPAK C and D as a separate class of service, which, in turn, would control the level of rates for that class of service.

19. The Telephone Committee also said in its Memorandum Opinion and Order of January 23, 1968:

"* * * If we should find that any class of service shows a deficiency of earnings, that there is no longer an adequate showing of continued competitive necessity or if the record should otherwise require adjustment in rates, then it would appear that Respondents should be directed to file appropriate tariffs to give effect to those findings. This has undoubtedly been anticipated by Respondents by the announcement of the filing of the increased program transmission and TELPAK rates which were deficient in earnings under Petitioner's own criteria. * * *" (Emphasis added.)

It is submitted that in the present posture of Docket 16258 the Respondents have no right to "bootstrap anticipation" of any such Commission findings, to the prejudice of any other party, when its own poor showing on the application of its generally sound rate-making principals has not yet even been completed, and when intervenors have not been afforded any opportunity to demonstrate--as this Petitioner is prepared to do in the case where these issues are now being litigated--that there is no deficiency of earnings in the Telpak service, that competitive necessity, vis a vis private microwave, is even more compelling than before, and that there are no other factors in the record

otherwise requiring a "windfall" increase in Telpak C and D revenues for AT&T. Unless it intends to prejudge the case, the Commission has no more right to require AT&T to anticipate any such findings as those indicated above.

20. The Common Carrier Bureau and the Bell System respondents are not the only important parties to Docket 16258. This Petitioner and all other intervenors herein have a right to the completion of their "day in Court", to complete cross-examination as their turn is reached, to present evidence when their turn is reached, and otherwise to try the issues which are now being litigated in Docket No. 16258, including specifically the reopened, remanded, incorporated "sole issue of whether those rates [existing Telpak C and D] are compensatory".

D. To Permit Tariff Filing Of Rate Increases of Over 100% For A Whole Class of Service (Telpak C and D) At This Time, With No Corresponding Decreases For Any Other Class of Service, Would Be To Permit An Abuse Of The Processes of The Commission And An Unconscionable "Windfall" For AT&T.

21. As noted above, the estimated annual impact of the proposed Telpak C and D rate increases on the airline industry alone would be roughly twenty-five million dollars, to say nothing of the cost to the Government and other large users of bulk communications. Such impact grows out of the fact that the proposed tariff filing calls for a 20% increase in Telpak C, 89% increase in Telpak D, increases of 133% and 200% in channel terminals, and 600% in telephone/telegraph equivalency, resulting in an increase of more than 130% over-all for the airline industry. These increases would mean a windfall of at least \$100,000,000 a year^{23/} for AT&T unless and until

^{23/} While AT&T has not yet furnished in the proceeding, or elsewhere, the total over-all impact on all customers, including the Government, of the proposed TELPAK C and D increases, it is believed that such impact would certainly not be less than \$100 million.

corresponding decreases for some other class or classes of service are put into effect, and without any Commission determination of any of the underlying presently litigated issues of Docket 16258, including the specific issue of the compensatory nature of present Telpak C and D rates. Insofar as the revenues of AT&T are concerned, such an effective rate increase, without a corresponding decrease for some other class or classes of service, would render nugatory the action of the Commission in ordering, at the end of Phase I-A, a \$100,000,000 reduction in revenues of AT&T. It would be difficult indeed to conceive of a more unconscionable abuse of the processes of a quasi-judicial tribunal.

E. The Impropriety of The Proposed Tariff Increases In Telpak C and D At This Time Is Underscored By Most Recent Developments In The Telpak Sharing Case.

22. In the TELPAC Sharing Provisions Case, Docket No. 17457, there are pending various proposals to revise the present provisions for limited sharing which may substantially alter the TELPAK market. Radical results in revenue requirements have been forecast, in the limited evidence filed to date in that proceeding by AT&T, if sharing is substantially broadened. A significant or substantial impact upon rates may result under proposals presently being investigated by AT&T as possible bases for a negotiated settlement in that case. Thus the pendency of that proceeding accentuates the improvidence of filing an increase of rates in TELPAK C and D at this time.

23. AT&T itself has acknowledged these uncertainties, in the testimony recently presented of Mr. Ellinghaus, Vice President in charge of the Marketing and Rate Plans Department, in Docket No. 16258:^{24/}

^{24/} Bell Exh. 46, p. 24, dated September 15, 1967.

"The proposed rates and supporting cost analyses have been based upon existing TELPAK sharing regulations. However, these regulations are now at issue in Docket No. 17457. Since the elimination or material alteration of those regulations can significantly affect the appropriateness of the proposed rates, we do not plan to make any adjustment in TELPAK rate levels at this time." (Emphasis added.)

As late as November 28, 1967, Mr. Ellinghaus again acknowledged that in view of the pendency of the TELPAK sharing case and "because there are some very basic principles involved here, we should defer for the present the filing of those TELPAK rates."^{25/}

24. During the week immediately preceding the announcement by AT&T of its proposed increases in TELPAK C and D rates, AT&T actively participated in conferences and good faith efforts by the parties looking to the determination of the significance, effect, and impact of proposals for limited extension of TELPAK sharing on a possible negotiated settlement of the issues in that case. As late as Friday, January 19, 1968, the last business day before the announcement in Docket No. 16258 of the proposed tariff filing, AT&T's representatives engaged in a joint report on the progress of such discussions to the Hearing Examiner in Docket No. 17457, without any mention of the proposed tariff filing. Despite all earlier opportunities and occasions for fair notice to other parties, apparently only Commission members and staff personnel of the Commission received any notification^{26/} prior to the announcement of January 22, 1968. This lack of prior disclosure to any of the parties hardly comports with the standards which would normally be observed and reasonably to be expected in such a situation.

^{25/} Tr. Vol. 97, p. 13,292. Another witness, AT&T's Vice President responsible for interstate cost studies, indicated his understanding that the rate changes "will be proposed or may be proposed at the end of this phase of the proceeding." Vol. 84, Tr. 11,605.

^{26/} Tr. Vol. 110, pp. 14,834-36.

F. The Efforts of AT&T to Extricate Itself from the Record in Docket No. 16258 Should Not Be Permitted to Undermine the Integrity of the Proceeding

25. To all participants in Docket No. 16258, including especially the Respondents, it is well known that AT&T has made a relatively strong case through preeminent economic experts on appropriate rate-making principles and factors, and that it has made an equally poor showing on its application of those principles and factors to the costing and pricing of its various classes of service, including TELPAK C and D. The proposed tariff filing of TELPAK C and D rate increases is a transparent effort on the part of AT&T to extricate itself from their unhappy situation without regard to the rights of Petitioner or of other parties to that proceeding. The "vehicle" for this purpose is equally obvious, namely, a tariff filing, and the attempted relegation of Petitioner and all other parties to very limited rights under statutory procedures for suspension and investigation.

26. Docket No. 16258 was designed by the Commission to be the first comprehensive study of the levels of charges for all classes of interstate services of the Bell System. The integrity of that proceeding is seriously threatened if the carrier is permitted to alter the basic framework of that proceeding in mid-hearing. In good faith, in expectation of a fair adjudication of the issues as they have been reiterated in this proceeding, and at considerable expense in time, effort, and sums of money, Petitioner and other intervenors have actively participated in every aspect of the public

hearing on Phase I-B of this case. They are prepared to complete cross-examination of witnesses and the presentation of their own evidence. Anything short of a full opportunity to do so in the present case would be a clear denial of due process.

That the Commission is not powerless to prevent such an obvious subversion of its processes is equally clear.

III. Points and Authorities

- A. In The Interest of Preserving Not Only The Due Process Rights Of The Parties But Also The Integrity And Effectiveness of Its Own Procedures, The Commission Has Not Only The Right But The Duty To Prevent Any Effective Filing Of The Proposed Telpak C and D Increases
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27. Cases closely in point in principle are those involving the Commission's "freeze" on the acceptance or processing of broadcast applications. The operation of broadcast facilities requires a license from the Commission (Section 301), which under Section 308 of the Act may be granted by the Commission only upon written application therefor. Section 309 of the Act provides that the Commission "shall determine, in the case of each application filed with it to which Section 308 applies", that it either "shall grant such application" or "shall formally designate the application for hearing." (Emphasis added.) While the Commission is given power to classify stations, assign frequencies, etc., there is no express statutory provision permitting it to refuse to accept applications in aid of the exercise of its rule making powers. Nevertheless, the

Commission has on several occasions issued interim rules stating that it would not accept any broadcast license application pending determination of a rule making proceeding relating to allocation of frequencies or assignment of channels.

28. Illustratively, in Interim Criteria to Govern Acceptance of Standard Broadcast Applications,^{27/} the Commission observed that "the time has come to re-study the standards under which we consider new and changed [standard broadcast] assignments and, as a first step toward this end, we find it necessary to bring a temporary, partial halt to our acceptance of applications for new and changed facilities." The Commission stated that it would issue a notice of proposed rule making to inquire into the standard broadcast assignment rules. It said as to the freeze on new applications: "This step is essential so that we may avoid compounding present difficulties with a continual flow of new assignments based upon existing, possibly inadequate, standards." A freeze order was adopted without prior notice or hearing. In a further Memorandum Opinion and Order in the same proceeding^{28/} the Commission held that its broadcast application freeze was not unlawful, and stated that all applications not consistent with its earlier order would be returned to the applicants. The Commission explained the reasons for the "freeze" as follows:

^{27/} 23 R. R. 1545, released May 10, 1962.

^{28/} 24 R.R. 1540, released October 15, 1962.

"The determinative factor is the context within which the rule was promulgated and, flowing from this context, the essential purpose of the rule. Viewing the interim criteria in terms of these factors, it is clear that the purpose of the 'freeze' was not the establishment of new allocation standards without public participation in rule making but, to the contrary, the creation of conditions under which formal rule making proceedings can be held in an effective, efficient, and meaningful manner. * * * We also recognize, however, that such a rule making proceeding, possibly of extended duration, could have little meaning if we continued to allocate new stations under the old rules, thus intensifying the very problems our rule making sought to remedy. * * * We believe the manner in which we chose to meet anticipated problems surrounding our rule making proceeding represented a necessary and proper exercise of our discretion in this area. Since the interim criteria created no new station assignment standards but were rather, primarily concerned with the effective functioning of Commission processes, the AM 'freeze' was procedural in nature and not subject to the formal rule making requirements of the Administrative Procedure Act." (Emphasis added.)

The Commission's action in adopting the freeze was affirmed by the Court of Appeals in Kessler v. FCC,^{29/} where the Court stated:

"We think the essential purpose and effect of the freeze order was not to create new rules, but to provide an effective interim procedure controlling the time and order in which applications were to be considered under the existing rules pending conclusion of the rule making proceeding." (Emphasis added.)

^{29/} 117 U. S. App. D. C. 130, 138, 326 F. 2d 673, 681 (1963).

The Court further stated that, "In the circumstances we think that the temporary freeze in the acceptance of applications was correctly viewed by the Commission as a matter of procedure and practice before it and that it was not a substantive rule, requiring the advance notice and public participation specified by Section 4 of the Administrative Procedure Act."^{30/} The Court finally concluded, "that an immediate freeze on new applications, other than those specifically excepted, was a reasonable means of assuring that the objectives of the contemplated rule making proceeding would not be frustrated."^{31/}

29. In Harvey Radio Laboratories, Inc. v. United States,^{32/} the Commission had put a freeze upon the processing of even previously-filed applications, pending determination first of the Daytime Skywave rule-making proceeding and subsequently the Clear Channel rule-making proceeding. Petitioner sought to compel the Commission to proceed with the processing of its application, on the ground its "unreasonable delay" violated Section 10 of the Administrative Procedure Act. The Court stated:

"The Clear Channel proceeding contemplates the possibility of a fundamental realignment of radio stations on the clear channel frequencies. Accordingly, 'piecemeal' consideration of requests for individual locations on these frequencies might well prejudice the ultimate allocation and defeat the purposes of the program. And the effort invested in a determination of individual proposals might be rendered futile by a contrary disposition of the rule making proceeding — thus producing even more delay."^{33/} (Emphasis added.)

^{30/} 117 U. S. App. D. C. at 139, 326 F. 2d at 682.

^{31/} 117 U. S. App. D. C. at 142, 326 F. 2d at 685.

^{32/} 110 U. S. App. D. C. 81, 289 F. 2d 458 (1961).

^{33/} 110 U. S. App. D. C. at 83, 289 F. 2d at 460.

Other cases on the same general subject include the following:

Harbenito Broadcasting Co. v. FCC^{34/} —

The Court upheld the Commission's temporary postponement of the issuance of a broadcast license to a construction permit holder even though the statute does not specifically authorize such postponement.

Vindicator Printing Co.^{35/} — The Commission's

freeze on acceptance of application from construction permit holders to change to another channel was held valid over objection it was beyond Commission's power. The Commission said the rule was "adopted to effectuate the expeditious development of television pursuant to the Table of Assignments," and that it was "a reasonable procedural method of implementing both the purpose of Section 3.636 and the equitable and efficient processing of applications."

^{34/} 94 U. S. App. D. C. 329, 218 F. 2d 28 (1954).

^{35/} 8 R. R. 328 (1952).

^{36/} 111 U. S. App. D. C. 44, 294 F. 2d 240 (1961).

See also ABC v. FCC^{37/} — To preserve status quo

Commission has power to grant special service authorizations without statutory hearing, even though there may be interference with operations of another licensee.

30. Certainly if the FCC is permitted to freeze broadcast licenses, without specific statutory authorization, it should be permitted in effect to freeze AT&T's rate levels for different classes of service during the pendency of Phase I-B of Docket 16258 involving the determination of the sine qua non of any intelligent consideration of any new level for any total class of service. This would be for the purpose of preserving the status quo pending completion of the present hearing and the Commission's determinations on the basis of the record in that hearing. To permit a carrier, at will, to greatly increase a whole class of rates in the midst of such a rate investigation is to deny any semblance of due process, as well as effective Commission control over its own proceedings. The absurdity of denying to the Commission the power to prevent such rate increases is seen by the situation that would be presented if AT&T were to attempt to increase message toll rates at this time. Certainly, if for no other reason than that service constitutes the bulk of the carrier's business, such an increase would be intolerable prior to conclusion of Phase I-B of Docket 16258. However, the principle is no different as applied to increases in Telpak C and D, or any other class of service. When the

^{37/} 89 U. S. App. D. C. 298, 191 F. 2d 492 (1951).

evidence has not even been completed, much less any Commission determination on such evidence, it would be just as improper for the Commission to prejudge the revenue requirements and rate levels for one class as another, by accepting AT&T's anticipation of the Commission's ultimate findings or by anticipating its own findings.

31. A somewhat analogous situation, involving rate filings, was presented in FPC v. Texaco, Inc.,^{38/} where the FPC adopted rules prescribing permissible pricing provisions in contracts of independent gas producers. Applications filed pursuant to contracts containing provisions not deemed permissible would be rejected under the rules. Subsequent to the adoption of said rules, petitioners filed applications for certificates to supply natural gas to a pipeline company, which application disclosed pricing provisions not permissible under the rules. Even though §7 of the Natural Gas Act, 15 U.S.C. §717, provided that the Commission "shall" set such an application for hearing, the Commission rejected the applications without hearing as not conforming to its rules. The Supreme Court upheld the Commission's action, stating that "the statutory requirement for a hearing under §7 does not preclude the Commission from particularizing statutory standards through the rule-making process and barring at the threshold those who neither measure up to them nor show reasons why in the public interest the rule should be waived." The Court explained its holding as follows:

^{38/} 377 U. S. 33 (1964).

"To require the Commission to proceed only on a case-by-case basis would require it, so long as its policy outlawed indefinite price-changing provisions, to repeat in hearing after hearing its conclusions that condemn all of them. There would be a vast proliferation of hearings. . . . We see no reason why under the statutory scheme the processes of regulation need be so prolonged and so crippled."

32. In the Texaco case the Court relied upon United States v. Storer Broadcasting Co.,^{39/} where there was in issue the FCC's multiple ownership rules. Petitioner claimed, inter alia, that an application for a broadcast station license should not be denied without the "full and fair hearing" required by the Communications Act of 1934. The Commission argued that the right to a hearing does not exist where an applicant does not meet the standards set forth in the FCC rules, i.e., where the application shows on its face that granting the application would violate the multiple ownership rules. The Supreme Court sustained the rules, stating as to the hearing point:

"We do not read the hearing requirement, however, as withdrawing from the power of the Commission the rule-making authority necessary for the orderly conduct of its business."^{40/}

See also National Broadcasting Co. v. United States (chain broadcasting regulations upheld).^{41/}

33. As all the preceding cases indicate, clearly the FCC may

^{39/} 351 U. S. 192 (1956).

^{40/} 351 U. S. at 202.

^{41/} 319 U. S. 190 (1943).

prescribe reasonable and orderly methods of procedure which would include preservation of the status quo. It is not material that there is no outstanding "freeze" order as such in this case at this time. It is the principle for which the "freeze" and "status quo" cases stand that is important and controlling here, namely, the Commission has the inherent power and, indeed, the regulatory responsibility to maintain the status quo in matters which it has under investigation or hearing, in order to protect its own decisional processes.

B. Other Persuasive Precedents Call For Rejection or Required Withdrawal As A Minimum Protection of The Rights of The Parties And The Processes of The Commission

34. As previously noted, in the Commission's original Telpak decision, the Commission was unable to determine at that time whether the rates for Telpak C and D were compensatory and it, accordingly, remanded that issue for further hearings and determination. As recognized by the Court of Appeals in its decision in American Trucking Associations, Inc. v. FCC,^{42/} the Commission's action in this respect constituted its official recognition that there was competitive necessity for the present level of Telpak C and D rates but that their compensatory character was undetermined. The official unresolved status of the present rate level for Telpak C and D services, and the pendency of the hearing to determine that very issue, take this case out of the scope of the usual rule that a carrier may ordinarily change its rates unilaterally, subject to investigation and suspension, by

^{42/} 377 F. 2d 121 (U. S. App. D.C. 1966), certiorari denied, 386 U. S. 943 (1967).

the simple expedient of filing proposed new rates.

34. Because of this recognition of the unresolved status of the present rate and the pending hearing thereon, the presently proposed rate increase filed by AT&T must be regarded as analogous to the proposal of a new rate which is prima facie unjustified absent a prior showing by the carrier of its justness and reasonableness. The present case is thus similar in principle to that of Seatrail Lines, Inc. v. United States,^{43/} in which the three-judge court directed the Interstate Commerce Commission to suspend the operation of certain rate reductions proposed by several rail carriers. The proposed tariffs there in question were based upon exemptions from the long and short haul prohibitions of the Interstate Commerce Act, which exemptions had been granted by the Commission in connection with the filing of the proposed tariff. Petitioners, competing water carriers, thereupon sought to set aside the exemption and suspend the operation of the tariff. The Court granted the relief sought. It held that the Commission's grant of the exemption from the long and short haul prohibitions was invalid and that absent that exemption the proposed tariff was prima facie illegal and could not be allowed to go into effect notwithstanding the carrier's general right to change unilaterally its rates under the Act. The Commission's recognition of the unresolved status of the present Telpak C and D rates and the present hearing to resolve that question, per se, require that any rate in excess of the present level must be regarded as presumptively excessive

^{43/} 168 F. Supp. 819 (S.D. N.Y. 1958).

and unreasonable until AT&T sustains its burden under Section 204 of proving the contrary - something which has not and cannot be determined until the conclusion of Phase I-B in Docket No. 16258.

35. Also in point in this respect is the decision of the Court of Appeals for the District of Columbia in Isbrandtsen Company v. United States,^{44/} in which the Japan-Atlantic and Gulf Freight Conference unilaterally proposed to initiate a dual rate system, under which a higher rate would be charged to all shippers who did not deal exclusively with Conference members. On petition to review by a competing carrier, the Court ruled that the Federal Maritime Commission could not allow the proposed rate to go into effect without first requiring the proposed carriers to sustain the burden of proving its reasonableness since the rate proposed was, prima facie, contrary to the anti-trust laws. In so doing, the Court significantly rejected the contention that the Commission's action was not subject to review on the grounds that it did not constitute final and formal approval of the proposed rate system:

"Whether or not the statutory requirements of finality are satisfied in any given case depends not upon the label affixed to its action by the administrative agency but rather upon a realistic appraisal of the consequences of such action. 'The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control.'" (Emphasis added.)^{45/}

^{44/} 93 U.S. App. D. C. 293, 211 F. 2d 51 (1954), cert. denied, 347 U.S.990.

^{45/} 93 U. S. App. D.C. at 297, 211 F. 2d at 55.

This language is peculiarly applicable to the present case. The pendency of the hearing to determine the justifiability of the present rate level makes this case, like Isbrandtsen, the exception to any prosaic general rule. AT&T's action, proposing new rates, taken in advance of decision on the present rates, is, in effect, an attempt to frustrate the purposes of the hearing in Phase I-B of the Docket 16258 by precluding to the extent possible further inquiry into the present rates through the expedient of filing new ones. Put in its proper perspective, the proposed rate increase in the face of the hearing on the compensatory nature of the present rate levels can be viewed as analogous in principle to a situation where the Commission has prescribed just and reasonable rates under section 205 of the Act and the carrier thereupon attempts to publish rates in excess of those prescribed by the Commission. Such an attempt by the carrier would be a violation of the integrity of the Commission's order under section 205. While in this case there is no Commission prescribed rate level for Telpak C and D, there is a hearing in progress to determine the compensatory nature of the present level, and the rate increase presently proposed is every bit as much of a violation of the Commission's hearing proceedings as would be a rate increase in the hypothetical case just posed.^{46/}

36. Further recognition of the necessity of preserving the integrity of administrative rate investigations and hearings from frustration and confusion as a result of proposed rate increases is found in Rule 2.4(f) of the Federal Power Commission. That Rule, adopted under statutory authority

^{46/} The necessity of maintaining the integrity of remand proceedings, such as here involved, was forcibly declared by the Court of Appeals for this circuit in Folkways Broadcasting Company v. FCC, 379 F. 2d 447 (U.S. App. D.C., 1967).

virtually identical to the Communications Act, provides: "during suspension [of a rate schedule], the prior existing rate schedule continues in effect and should not be changed during suspension."^{47/} This Rule and the Commission's power to reject further rate increase proposals while a prior rate schedule is the subject of suspension and investigation, was specifically upheld in Amerada Petroleum Corp. v. Federal Power Commission.^{48/} In so holding the Court stated:

"Moreover, by section 16 of the Act, the Commission is expressly vested with power 'to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders * * * as it may find necessary or appropriate to carry out the provisions of this Act.' Manifestly, that is a sweeping grant of administrative authority to be exercised in the sound discretion of the Commission. In the exercise of such power, the Commission has consistently declared its policy and interpretation of the Act to be that during the suspension of a rate, the prior existing rate schedule continues in effect and shall not be changed."
203 F. 2d at 575. (Emphasis added.)

Substantially the same authorization contained in Section 16 of the Natural Gas Act, referred to in the preceding quotation, is provided by

f.n. 46 continued In that case the Court of Appeals reversed the Commission's grant of temporary operating authority to a broadcast license applicant pending the Commission's hearing on the application pursuant to a Court decision which had vacated the Commission's prior grant of the license and remanded the case for hearing. The Court ruled, inter alia, that the Commission's grant of temporary authority on remand was a violation of the integrity of the Court's remand order and review processes.

^{47/} 18 C.F.R. §2.4(f).

^{48/} 293 F. 2d 572 (10th Cir., 1961), cert. denied, 368 U.S. 976.

Section 4(i) and (j) of the Communications Act of 1934.^{49/} The same policy and regulatory considerations which persuaded the Federal Power Commission to adopt Rule 2.4(f) and the Tenth Circuit to uphold it are also present in this case, i.e., a carrier cannot be allowed to frustrate or impede the Commission's investigation into the rate level for a whole class of service by the expedient of filing a new tariff.

37. It appears that the orderly and efficient regulatory procedure in the AT&T rate investigation would be to maintain the status quo until the issues "condition precedent" to any increase in rates for a whole class of service, now being litigated in Phase I-B of Docket 16258, including the specific issue of whether present Telpak C and D rates are compensatory, have been decided. To permit AT&T to change rate levels and relationships before decision of such issues would emasculate the present proceeding. In this regard, the Ashbacker doctrine is relevant as a recognition that the Communications Act is not to be construed in such a way as to require or permit a procedure which frustrates proper and orderly regulatory processes.

^{49/} Sections 4(i) and 4(j) of the Communications Act of 1934 provide:

"(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

"(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."

In Ashbacker Radio Co. v. FCC,^{50/} the Commission had followed the statutory procedure of designating an application to change operating frequency for hearing, but at the same time had granted a mutually exclusive application as it was permitted to do by the precise language of the Act. The Supreme Court held that the Commission may not grant one of two mutually exclusive applications before a hearing of the other. The Court said with respect to the procedure that was used by the Commission: "That may satisfy the strict letter of the law but certainly not its spirit or intent." It further noted, as to the Commission's argument that petitioner was not harmed because if its application was meritorious, the Commission could grant it and thereby displace the licensee previously authorized:

"As the Fetzer application has been granted, petitioner, therefore, is presently in the same position as a newcomer who seeks to displace an established broadcaster. By the grant of the Fetzer application petitioner has been placed under a greater burden than if its hearing had been earlier. Legal theory is one thing. But the practicalities are different."^{51/}
(Emphasis added.)

38. Of course, we are not now dealing with an area of mutually exclusive rights in terms of licenses or franchises. But we do face a potential situation of impossible interlocking, interwoven and overlapping issues and determinations. For a striking example, what would "the right" of the Petitioner to complete in Docket 16258 the trial of the specific pending issue of whether the present Telpak C and D rates are compensatory, in the light of

^{50/} 326 U. S. 327 (1945).

^{51/} 326 U. S. at 332.

appropriate rate-making principles, factors and relationships between classes of service to be decided in that proceeding — what would such "right" be worth as a practical matter — if by the simple expedient of a tariff filing AT&T is permitted in the interim to increase rates for this entire class of service by more than 100%? Stated differently, to impose upon Petitioner the burden of trying in a new proceeding, before completion of the pending proceeding, substantially the same issues, namely, appropriate rate-making principles, including the factor of competitive necessity vis a vis private microwave, and proper compensatory level of Telpak C and D in the light of such principles and factors, would be the clearest possible denial of due process. Formalistic observance of any or all statutory steps in connection with such tariff increase filing would be meaningless ritual but not due process.

39. The statutory accounting and refund procedure is likewise no answer because, first, it would still contemplate splintering of the AT&T rate investigation necessarily resulting in proliferation of proceedings and duplication of issues. Second, it would be unworkable, as the Supreme Court recognized in FPC v. Tennessee Gas Transmission Co.,^{52/} where the Court said:

"True, the exaction would have been subject to refund, but experience has shown this to be somewhat illusory in view of the trickling down process necessary to be followed, the incidental cost of which is often borne by the consumer, and in view of the transient nature of our society which often prevents refunds from reaching those to whom they are due."

^{52/} 371 U. S. 145, 154-55 (1962).

This observation is especially applicable to the airline industry which, incidentally, notwithstanding its expanding growth, is now in a rising cost-net revenue squeeze and would probably have no choice but to try to pass on to the traveling public such serious price increases as have been noted above, with no practical means of ever distributing potential refunds, if any, to the persons entitled thereto.

40. We do not claim, of course, that all administrative rate proceedings must always run their full course before any rate changes may be made, or other action taken. The Supreme Court has ruled, for example, in FPC v. Tennessee Gas Transmission Co., supra, that the FPC has power to enter an interim order as to the rate of return before an issue of cost allocation among rate zones had been decided, which in effect is what the Commission has done in Phase I-A of Docket 16258. To the same effect is FPC v. Natural Gas Pipeline Co.^{53/} But it is important to note that in all these proceedings all the evidence on the rate-of-return issue had been presented and it was ripe for decision. The Court in the latter case noted that "The right to a full hearing before any tribunal does not include the right to challenge or rely on evidence not offered or considered."^{54/} A fortiori, in the light of the posture of Phase I-B of Docket 16258, a more than 100% interim rate increase for a whole class of service should not be ordered or permitted on the basis of presumed or asserted facts not tested by completion of cross-examination, and not yet even exposed to counter testimony.

^{53/} 315 U.S. 575 (1942).

^{54/} 315 U.S. at 584.

41. The Commission does not have to look beyond its own action of last March, 1967, in connection with proposed private line telegraph equipment increases (of almost de minimus order and financial impact compared to the proposed Telpak C and D rate increases here involved) for precedent on the most minimum action required in the kind of situation here involved. In politely requiring AT&T to postpone the proposed effectiveness of such component part of one class of private line service, this Commission very pointedly stated:

"It appears that the total effect of the proposed revisions will be an increase in overall revenues and earnings from your interstate and foreign communications services. However, no other rate adjustments are proposed by you to offset this increase although your overall earnings are currently at a high level. It is the Commission's intention in Docket No. 16258 to arrive at a determination within the near future of reasonable overall revenue requirements and earnings for your interstate and foreign services. This determination and the implementation thereof may require adjustments in rate levels applicable to your several interstate services. It is unlikely, however, that these actions can be effectuated prior to May 1, 1967 - the effective date of the proposed tariff revisions. Therefore, it would appear that equitable treatment of the users of all service classifications as well as orderly procedure would best be served by effectuating any such revisions concurrently with such other revisions, if any, as may result from the Commission's revenue requirement determination in Docket No. 16258." (Emphasis added.)

The net result was a postponement of the proposed effectiveness of such an increase to August 1, 1968. In the light of the present status of Docket 16258, it is now apparent that even that date will be premature for such purpose. In the present situation, where a whole class of service is

involved, rejection of the proposed tariff, required withdrawal thereof, or at the very least indefinite postponement of the effectiveness thereof pending determination of the sine qua non issues now sub judice, is clearly required, if due process and the integrity of the Commission's procedure are to be preserved.

42. Finally, on Monday afternoon, January 29, in a hearing conference in Docket 16258, the Common Carrier Bureau indicated that it would recommend relief in the nature of that suggested in the preceding paragraph, namely, that the Commission "request" AT&T to postpone its proposed tariff effectiveness for rate increases for audio and video program services for one year, but that it might well not make any similar recommendation for postponement of effectiveness of Telpak tariff increases.^{55/} That would be the rankest kind of discrimination as between classes of service parties to Docket 16258, and especially so in view of the fact that there has been no Commission determination in favor of the competitive necessity for existing program service rates, as there has been in the case of Telpak C and D, and the fact that there is no reopened, remanded, and relitigated issue as to the compensatory nature of present program service rates, as there is in the case of Telpak C and D. If there is to be any "picking and choosing" as between these two classes of service parties to the present litigation, the favor would have to fall on the side of the Telpak users. We cannot believe that the Telephone Committee or the Commission would lend its stamp of approval to the kind of reversely justified discrimination

^{55/} Tr. Vol. 114, pp. 15,284-85.

suggested by the Common Carrier Bureau as a possible solution to the present problem.

WHEREFORE, THE PREMISES CONSIDERED, Petitioner respectfully prays:

1. That the Commission reject or require the withdrawal of the proposed tariff schedules providing for increases in the rates for TELPAK C and D services; and

2. That the Commission grant such further relief as to the Commission may seem just and proper in the premises.

Respectfully submitted,

AIR TRANSPORT ASSOCIATION OF AMERICA

By /s/ John E. Stephen
General Counsel
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

/s/ William E. Miller

/s/ Herbert E. Forrest
Steptoe & Johnson
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

January 30, 1968

Comparative Costs - Proposed Telpak D vs. Private Microwave
(Furnished by AT&T at Request of AT&T, Vol. 95, pp. 13, 18, Docket 16258)

TELPAK D vs PMW

160 ACTIVATED CHANNELS

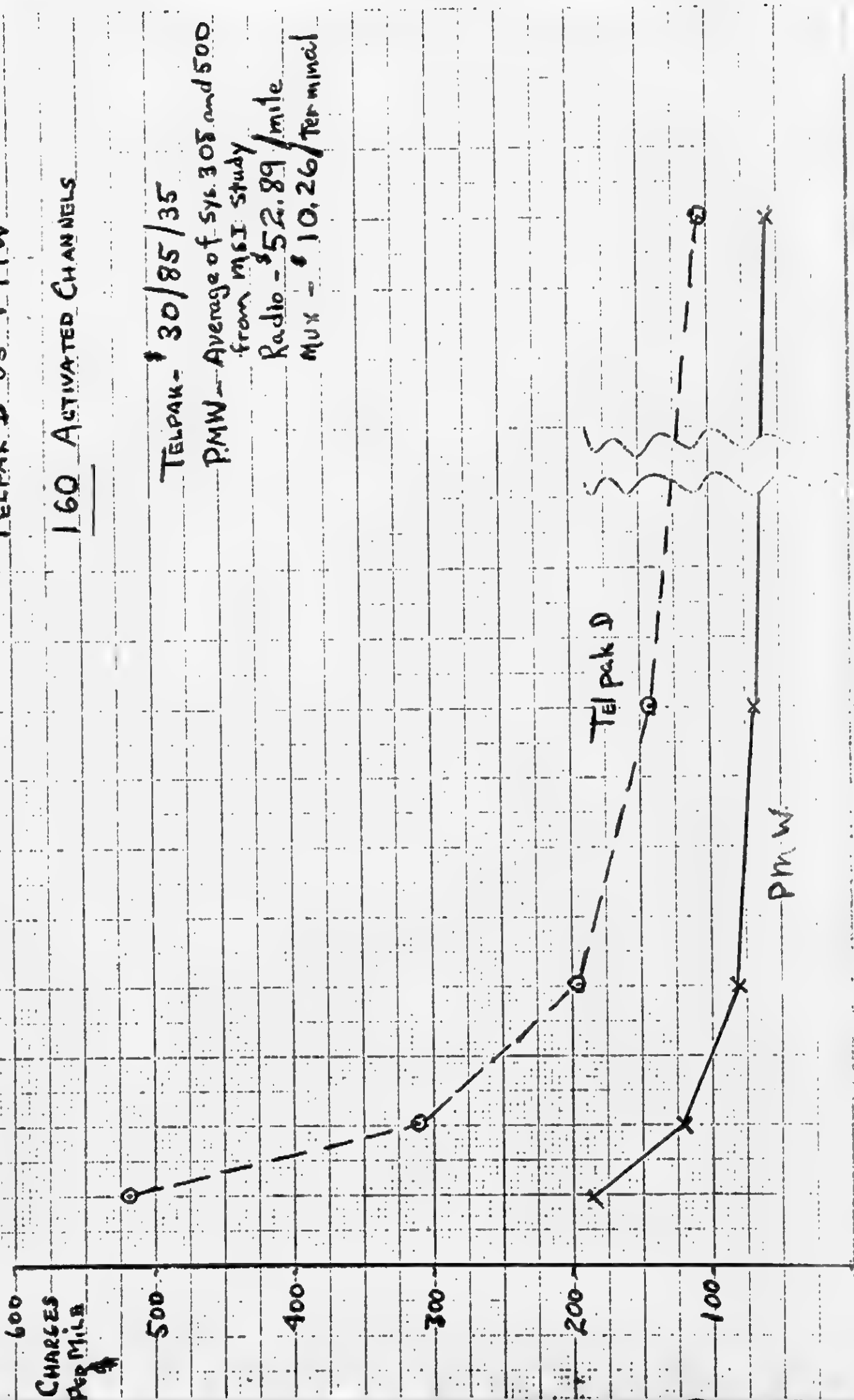
TELPAK - \$30/85/35

PMW - Average of Sys 308 and 500

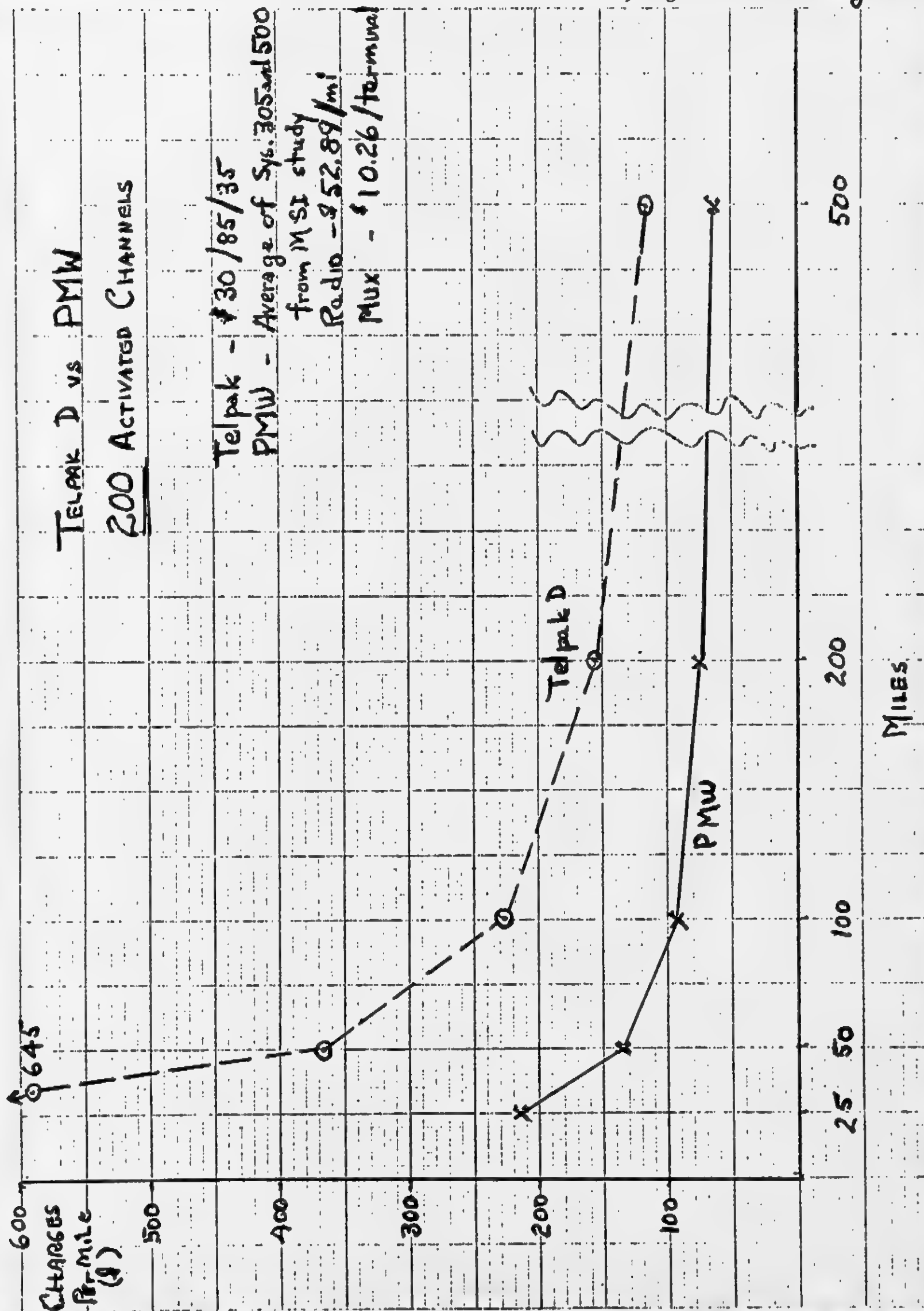
from M&I Study

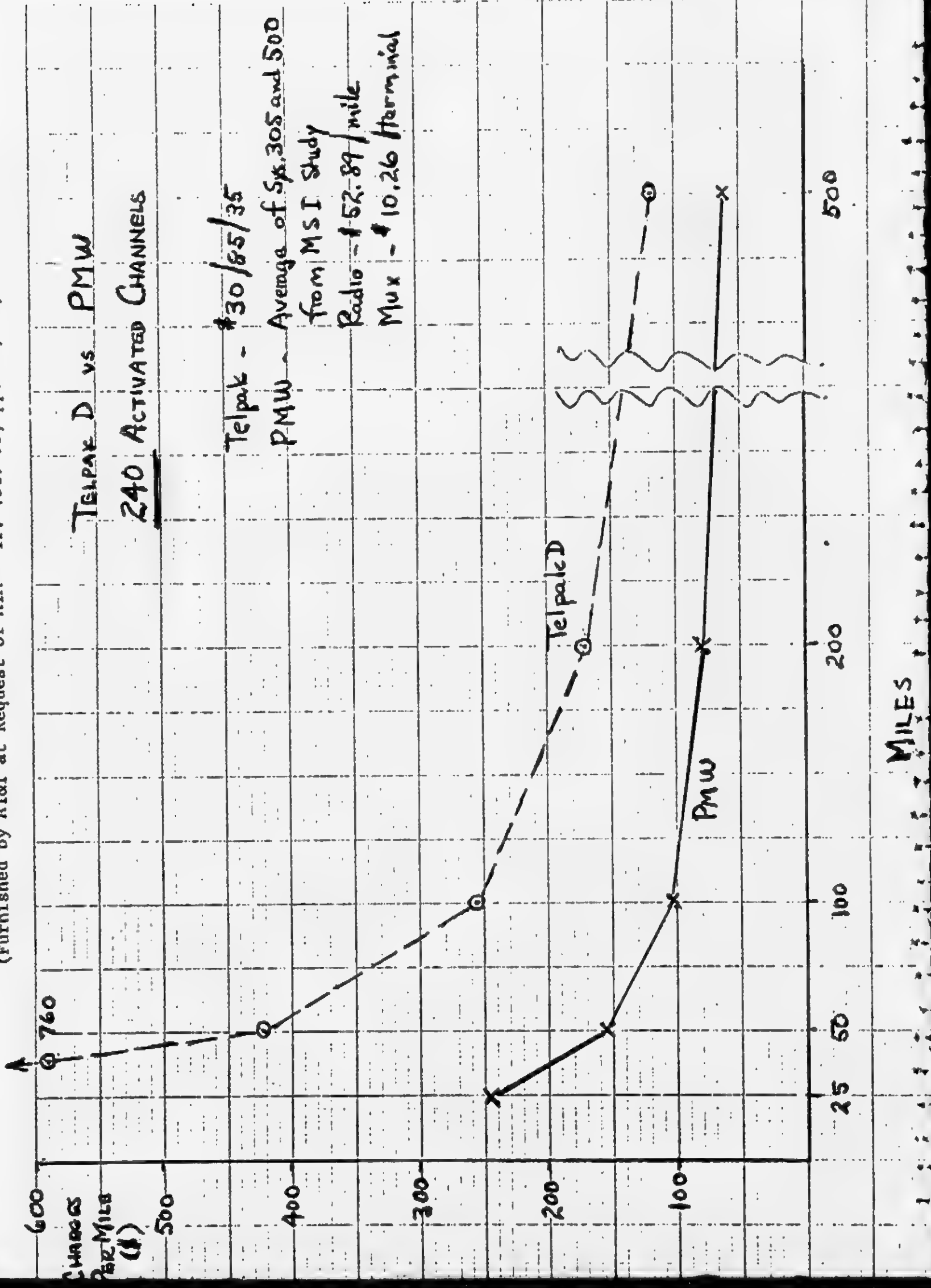
Radio - \$52.89/mile

MUX - \$10.26/terminal



25 50 100 200 300





AMERICAN TELEPHONE AND TELEGRAPH COMPANY

LONG LINES DEPARTMENT

32 AVENUE OF THE AMERICAS

NEW YORK, N. Y. 10013

R. B. NICHOLS
ADMINISTRATOR RATES AND TARIFFSAREA CODE 212
393-7277

February 1, 1968

Transmittal No. 10001

Secretary
Federal Communications Commission
Washington, D. C. 20554Attention: Common Carrier Bureau

The accompanying tariff material, issued by the American Telephone and Telegraph Company, Long Lines Department, is sent to you for filing in compliance with the requirements of the Communications Act of 1934, as amended. This material consists of revised tariff pages as indicated on the following check sheet, and is issued to become effective April 1, 1968:

<u>Tariff</u>	<u>Check Sheet</u>
<u>F.C.C. No.</u>	<u>Revision No.</u>
260	410th

This filing provides for changes in regulations and rates for TELPAK (Series 5000) service. In substance, the tariff revisions provide for (a) an increase in rates for TELPAK C and D base capacities, (b) a change from 12 to 2 in the number of telegraph channels having the equivalent of one voice grade channel, (c) an increase in rates for service terminals, (d) the restructuring of rates for wideband service terminals, and (e) the elimination of Type 5752 and Type 5801 service terminals and certain wideband switching and selecting arrangements for which there is no longer a service requirement. Minor text changes, for clarification purposes, have also been included.

A summary of the considerations underlying the changes in rates for TELPAK C and D base capacities and service terminals and in the telegraph/telephone channel equivalency ratio has been set forth in the Statement of Bell System Respondents, submitted January 9, 1967 in compliance with the order of the Telephone Committee released November 25, 1966 (FCC 677-1582). As there indicated, an increase in the general level of rates for TELPAK service is required to improve the earnings contribution of this category of service. Considerations underlying the formulation of the other changes are briefly set forth below. Additional supporting data have been furnished the Commission separately.

A tabular summary of existing and proposed rates for principal items of service involved in this filing is set out in Attachment A to this letter.

Wideband Service Terminals and Switching Arrangements

The rates for wideband service terminals have been established after taking into consideration, existing charges for wideband service, the cost characteristics of such service, and the proposed rate schedule for TELPAK C and D base capacities. These revisions are designed to provide more reasonable rate relationships among the various wideband terminal arrangements available with Series 5000 and Series 8000 channels. The rate structure is also simplified and its administration made easier.

As a result of these considerations, rates for wideband service terminals have been restructured to provide six basic offerings defined in terms of their service characteristics. They are as follows:

Terminals arranged for transmission of high speed data or facsimile requiring TELPAK base capacity

- (1) equivalent to six voice channels
- (2) equivalent to twelve voice channels
- (3) equivalent to sixty voice channels

Terminals provided to meet special service requirements of the United States Government requiring TELPAK base capacity

- (4) equivalent to six voice channels
- (5) equivalent to twelve voice channels
- (6) equivalent to sixty voice channels

One of the present offerings of wideband switching arrangement has a capacity to terminate up to ten wideband channels. Since charges for this service are based on the number of terminations used, the needs of customers having a switching requirement of less than ten channels can be met with one offering. Accordingly, two other wideband switching arrangements of lesser capacity are no longer needed and are being discontinued.

Interstate-Intrastate Channels and Services

Included are proposed revisions pertaining to the computation of charges for TELPAK base capacity when such base capacity is arranged for use as a number of individual channels, some of which carry interstate traffic and some of which carry only intrastate traffic. These revisions indicate that the minimum charge for the interstate portion of the base capacity will be the charge computed by multiplying the rate and the airline mileage reduced by the charge for the intrastate portion of the base capacity.

This filing also provides for related text changes in Series 8000.

Acknowledgment and date of receipt of this filing are requested. A duplicate letter of transmittal is attached for this purpose. All correspondence and inquiries in connection with this filing should be addressed to Mr. R. B. Nichols, Administrator Rates and Tariffs, American Telephone and Telegraph Company, 32 Avenue of the Americas, New York, N. Y. 10013.



Administrator Rates and Tariffs

Attachments:

Duplicate Letter
Tariff Pages
Attachment A

Wide Band Service Terminals
and
Supplementary Control Arrangements (5000 Series)

Monthly Rates

	Present			Prop.
	Type <u>5701</u>	Type <u>5702</u>	Type <u>5704</u>	
- 1st Station	\$100	\$250	\$340	\$400
- Subsequent Station	-	195	-	200
- IXC in Multiway Switch - Line	-	130	200	200
- Trunk	-	210	-	210
- Supplementary Control Arrangement	-	-	65	65
	Type <u>5703</u>	Type <u>5705</u>		
- 1st Station	\$300	\$425		\$425
- Subsequent Station	130	375#		375
- IXC in Multiway Switch - Line	-	255#		255
	Type <u>5706</u>			
- 1st Station		\$430		\$430
- Subsequent Station		220		220
- IXC in Multiway Switch - Line		240		240
	Type <u>5707</u>			
- 1st Station		\$560		\$560
- Subsequent Station		-		-
- IXC in Multiway Switch - Line		255		255
	Type <u>5751</u>	Type <u>5754</u>		
- 1st Station	\$130	\$455		\$455
- Supplementary Control Arrangement	-	-		-

*Replaces present Types 5701, 5702 and 5704

**Replaces present Types 5703 and 5705

***Replaces present Types 5751 and 5754

#Filed to become effective March 1, 1968

Service Terminals for Use as
Channels for a Lesser Capacity (5000 Series)

Monthly Rates

	<u>Present</u>		<u>Proposed</u>	
	<u>First Station in an Exchange</u>	<u>Subsequent Station</u>	<u>First Station in an Exchange</u>	<u>Subsequent Station</u>
<u>Voice Type</u>				
5201	\$ 15.00	\$ 5.00	\$ 35.00	\$15.00
5202	15.00	5.00	35.00	15.00
5203	15.00	5.00	35.00	15.00
5204	15.00	5.00	35.00	15.00
5205	15.00	5.00	35.00	15.00
5206	15.00	5.00	35.00	15.00
5301	15.00	5.00	35.00	15.00
<u>Teletypewriter Type</u>				
5101	15.00	5.00	35.00	15.00
5102	15.00	5.00	35.00	15.00
5103	15.00	5.00	35.00	15.00
5104	15.00	5.00	35.00	15.00
5105	15.00	5.00	35.00	15.00
5106	15.00	5.00	35.00	15.00
<u>Telephotograph Type</u>				
5402	60.00	10.00	140.00	20.00
<u>Data Type</u>				
5302	15.00	5.00	35.00	15.00
5401	235.00	15.00	255.00	25.00

Base Capacity

Monthly Rates per Airline Mile

	<u>Present</u>	<u>Proposed</u>
Type 5700	\$25.00	\$30.00
Type 5800	45.00	85.00

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of)

AMERICAN TELEPHONE AND TELEGRAPH)
COMPANY)

) Transmittal No. 10001

Revisions of Tariff F.C.C. No. 260)
Series 5000 Channels (TELPAK Services))

OPPOSITION

(To be acted on by the Commission)

American Telephone and Telegraph Company (AT&T)
hereby opposes the several petitions which request,
variously, preliminary injunctive relief, or the rejection,
withdrawal, or postponement of the tariff revisions
filed February 1, 1968 with Transmittal No. 10001.* In
support of such opposition it respectfully states as
follows:

1. The petitions filed by Arinc and United
request extraordinary relief in the form of a Commission

* "Petition to Enjoin AT&T from Filing Revised TELPAK Tariffs" dated January 30, 1968, filed by United Air Lines, Inc. (United); "Petition for an Order in the Nature of a Preliminary Restraining Order" dated January 31, 1968, filed by Aeronautical Radio, Inc. (Arinc); "Petition to Reject or Require Withdrawal of Proposed Increases in TELPAK Rates" dated January 30, 1968, filed by Air Transport Association of America (ATA); "Petition for Rejection of Tariff Schedules and for Other Appropriate Relief" dated February 5, 1968, filed by American Trucking Associations, Inc. (American Trucking); and "Application for Review" dated February 2, 1968, filed by the Associated Press and Twin Coast Newspapers, Inc. (AP and Twin Coast). This last pleading, although anomalously labeled, appears to be intended to secure relief similar to that requested by other parties.

order enjoining the filing of any revisions of Tariff F.C.C. No. 260 providing for increases in the level of TELPAK rates. The petitioners cite no legal authority, statutory or otherwise, as a basis for the issuance of such an order, and there is none. In any case, since these petitions have been mooted by the filing on February 1, 1968 of the tariff revisions which accompanied AT&T's Transmittal No. 10001, no further response is required. To the extent that the petitions contain allegations which might be said to support the relief requested in the petitions of other parties, such allegations are answered below.

2. The petitions filed by ATA and American Trucking and the Application for Review filed by AP and Twin Coast need not be separately summarized since they have a common purpose - to secure rejection, withdrawal or indefinite postponement of the TELPAK rate revisions filed February 1, 1968.* Reduced to their simplest terms, the arguments common to each of these pleadings run as follows: the Commission has implied statutory authority to reject or order withdrawal of the tariff filing because a filing of TELPAK rate revisions at this time is contrary to Commission orders in Docket No. 16258, and such filing will

* The filings by American Trucking, AP, Twin Coast and Arinc adopt and incorporate by reference the petition filed by ATA.

"undermine the integrity" of the latter proceeding and will deprive petitioners of procedural rights, more especially an alleged right to an adjudication of the issue as to whether existing TELPAK rates are compensatory.

3. These arguments are not valid. The petitioners have previously advanced substantially similar contentions in petitions seeking to have the Commission reject, or compel withdrawal of, the rate revisions filed by AT&T January 9, 1967 with Transmittal No. 9467. See, particularly, AT&T's oppositions to such petitions dated April 13, May 8 and July 18, 1967, which are applicable here and are accordingly incorporated herein by reference. In its decision dismissing these earlier petitions (9 F.C.C.2d 153), the Commission gave no apparent weight to such arguments and it should do likewise here.

4. A fundamental flaw in petitioners' position is their assertion that the Commission has power to reject or to compel withdrawal of the tariff filing in question. As AT&T has previously pointed out in its oppositions to the petitions filed in Transmittal No. 9467 (Opposition dated April 13, para. 5; Opposition dated May 8, para. 2; Opposition dated July 18, para. 2), the only statutory basis for rejection of a tariff without opportunity for a hearing is that stated in Section 203(d) of the Communications



Act and it is not applicable here. Otherwise, a carrier subject to the Act has the statutory right to file tariff revisions and to have such revisions become effective subject, of course, to the Commission's powers of suspension, investigation and determination in accordance with Section 204 of the Act.

5. Counsel for most of the petitioners here tacitly concede a lack of express statutory authority for the relief they request, and have exercised much ingenuity in an attempt to supply this deficiency by asserting the existence of an implied authority.* Thus, in its petition, ATA cites several cases involving this Commission's powers to adopt general rules regulating the filing and processing of license applications under Title III of the Communications Act as support for the view that corresponding limitations may be imposed on the filing of tariffs under Title II of the Act. A similar case involving the Federal Power Commission's right to adopt rules regulating the issuance of certificates of public convenience and necessity is also cited as additional support for this proposition. (ATA Petition, paras. 21-33). But the specific statutory right of a carrier to make and file revised rates for its

* The petition filed by American Trucking purports to find such express statutory authority in the provisions of Section 203(b) and (d) of the Act giving the Commission discretionary power to modify the statutory requirements relating to public notice of a rate revision. (American Trucking Petition, paras. 5-8.) No authority for such a construction of the statute is, or could be, cited.

service offerings cannot be analogized to the inchoate rights of an applicant for a license or certificate issuable at a Commission's discretion.

6. Equally inapposite are cases cited by ATA, involving the Interstate Commerce Commission and the Federal Maritime Board (ATA Petition, paras. 34, 35). Each of these cases involved a carrier's right to establish exception rates whose lawfulness, under the statute, depended on the prior issuance of a valid Commission or Board order. No such situation is presented here.

7. The Commission, the parties to this case and the public have all been on notice for more than a year concerning AT&T's intention to file TELPAK rate revisions. (Letter dated January 9, 1967 from Bell System Respondents to the Commission, distributed to the parties in Docket No. 16258.) Petitioners' strained attempts to find in Commission orders an abridgment, during the pendency of Docket No. 16258, of AT&T's statutory right to make such a tariff filing are totally unconvincing. For example, the provisions of the Commission's Memorandum Opinion and Order of December 22, 1965 which advert to the possibility of interim rate adjustments (quoted in American Trucking Petition, para. 7; AP and Twin Coast Application, para. 6; Arinc Petition, para. 3), obviously

refer to Commission ordered adjustments and were not intended as a limitation on voluntary tariff revisions filed by the Bell System Respondents. It is significant that neither the Hearing Examiner nor counsel for the Common Carrier Bureau in Docket No. 16258 could see any impediment to AT&T's filing of rate revisions arising from the pendency of that proceeding or from Commission orders relating thereto (Docket No. 16258, Tr. 15261-65).

8. The petitioners insist, however, that since Commission orders have made the compensativeness of existing TELPAK rates "the sole remaining issue" with respect to such rates, the Commission must resolve that issue in the negative before increased TELPAK rates can be filed (ATA Petition, para. 13). This is equivalent to saying that petitioners have a vested right to maintenance of existing TELPAK rates so long as those rates can be shown to be compensatory. The Commission's orders are not susceptible of so novel an interpretation.

9. Moreover, petitioners' assertion (ATA Petition, para. 12) that AT&T's own evidence in Docket No. 16258 "strongly indicates that present . . . rates are compensatory," misses the point. AT&T's evidence shows that the unit cost-revenue relationship for TELPAK has been unfavorable at existing rates, and that the relationship has been deteriorating with the growth of

the market. (E.g., Docket No. 16258, Bell Ex. 24B, p. 5.) Accordingly, "a market and cost study to determine whether projected revenues under present rates would cover full additional costs" (ATA Petition, para. 12) would have been an unnecessary and futile expenditure of time and effort. It is clear that an increase in the level of TELPAK rates is called for in order to improve the cost-revenue relationship for that service.

10. The petitioners also assert that if the revised TELPAK rates are permitted to become effective without corresponding decreases in the rates for other services, a windfall for AT&T would result (ATA Petition, para. 21). Even if this allegation were true, and its truth is denied, it would not constitute a basis for rejecting or ordering the withdrawal of the proposed rate revisions. Apart from the lack of legal basis for any such action, as shown above, the determination of appropriate rate levels for TELPAK services is not dependent on the adequacy or inadequacy of the Bell System's overall earnings. The proposed TELPAK rates are not intended to increase the System's earnings in excess of the range found appropriate by the Commission in Docket No. 16258. If a question should later be raised with respect to such earnings, the Commission has available to it adequate means for dealing with that question.

11. A comment is appropriate concerning petitioners' allegations with respect to the TELPAK Sharing case (F.C.C. Docket No. 17457). ATA refers to the informal negotiations which took place in that proceeding during the week preceding the public announcement of the proposed filings, and states that AT&T's representatives participated "without any mention of the proposed tariff filings." (ATA Petition, para. 24.) Arinc is critical of AT&T because, at the time of the announcement of the proposed filings, no mention was made of an alleged commitment to the Commission in the TELPAK Sharing case regarding the submission of a new tariff structure for all Private Line services which, among other things, would replace the TELPAK tariff (Arinc Petition, para. 8).

12. AT&T denies these allegations. During the off-the-record discussions which took place in Docket No. 17457, counsel for the Bell System Respondents took pains to point out that revised TELPAK rates had been proposed, and that they would be filed in due course. A warning concerning the significance of the proposed rates was repeated on the record at the hearing session held on Friday, January 19. (Docket No. 17457, Tr. 181.) If ATA's complaint is that it failed to receive advance notice of the advance announcement of the proposed filing, it has

failed to allege or show how it was prejudiced by lack of such information.

13. Arinc's allegation is totally incorrect and misleading. During the informal discussions regarding possible means of settling the sharing case by agreement, the Bell System Respondents made clear their willingness to study various suggestions which had been made by parties to the proceeding and by counsel for the Common Carrier Bureau. But no commitment beyond this was made, and specifically there was no "commitment" to submit a new tariff structure for all Private Line services. This was made abundantly clear by counsel for the Bell System Respondents at the time of the report on negotiations made to the Hearing Examiner. (See Docket No. 17457, Tr. 170-72.)

14. Essentially, petitioners' arguments are in error because they seek to apply to AT&T's action the legal requirements that must be satisfied by the Commission before it can issue a valid rate order. AT&T's action in filing the TELPAK tariff revisions was taken pursuant to clear statutory right to initiate tariff filings. In short, the petitioners have failed to establish any legal authority or to allege any material facts which would justify or permit the relief requested.

WHEREFORE, the petitions should be denied and the tariff revisions submitted with AT&T Transmittal No. 10001 should be permitted to become effective April 1, 1968.

Respectfully submitted,
AMERICAN TELEPHONE AND TELEGRAPH COMPANY

By /s/ Ernest D. North
Ernest D. North

By /s/ Harold J. Cohen
Harold J. Cohen

By /s/ C. Duane Aldrich
C. Duane Aldrich

195 Broadway
New York, New York 10007

Its Attorneys

February 9, 1968

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
TELPAK Tariff Sharing Provisions of American)	DOCKET No. 17457
Telephone and Telegraph Company and The Western)	
Union Telegraph Company)	
)	
AMERICAN TELEPHONE AND TELEGRAPH COMPANY)	
)	
Revisions to American Telephone and Telegraph)	TRANSMITTAL No.
Tariff, F.C.C. No. 260, pages 79, et seq.)	10001
(Telpak Series 5000 Channels))	(February 1, 1968)

To: The Commission

PETITION FOR TEMPORARY RELIEF

Aerospace Industries Association of America, ("AIA"), Inc.,

by its attorneys, and, pursuant to the Communications Act of 1934, as amended, makes application for an order for temporary relief staying the increases in rates for Telpak services contained in American Telephone and Telegraph Company ("AT&T") Transmittal No. 10001 filed February 1, 1968, until the issuance of a final order by the Commission in Docket No. 17457, and for such other and further relief as may be appropriate. In support of this appeal, petitioner states:

SUMMARY

The required statutory determinations as to the reasonableness of proposed rate increases for Telpaks C and D can only be made in the light of a prior determination concerning the extent of permissible sharing of Telpak facilities.

By its own dilatory tactics AT&T has prevented an expeditious resolution of that question. It should not be permitted to benefit from its own wrong doing. Since AT&T is responsible for the present impasse, the rate increases which it proposes must in fairness and equity be held in abeyance pending a final decision in the Telpak sharing proceedings in this docket. In these circumstances holding the rates in abeyance is also necessary to vindicate the Commission's processes.

The Commission has the authority to hold the proposed rate increase in abeyance, as here requested, under Sections 4(i) and 4(j) of the Communications Act of 1934, as amended, See Niagara Mohawk Power Corp. v. Federal Power Commission, 379 F. 2d 153, 158 (C.A. D.C. 1967); Amerada Petroleum Corp. v. Federal Power Commission, 293 F. 2d 572 (C.A. 10, 1961), certiorari denied 368 U.S. 936 (1962).

STANDING OF PETITIONER

1. AIA is organized as a non-stock, membership corporation under the laws of the State of New York and is authorized, as a non-profit corporation, to conduct its affairs in the District of Columbia. AIA is the national trade association of the manufacturers of aircraft, missiles, spacecraft, propulsion, navigation and guidance systems, support equipment, accessories, parts, materials and components used in the construction, operation and maintenance of these aerospace pro-

ducts. Current membership of AIA includes 58 aerospace manufacturing companies plus their corporate divisions.

2. The aerospace industry consists of AIA member companies, aerospace companies that are not AIA members and the aerospace activities of non-member companies. In 1967 the aerospace industry employed more than 1,407,000 persons and had sales of over 27.4 billion, of which approximately 80 percent was to various federal government agencies. As a consequence, the aerospace industry is the largest seller to the federal government. Since approximately 50 percent of the contract dollars on its government contracts are subcontracted, the aerospace industry is also the largest buyer for government account. AIA member companies constitute the core of the aerospace industry. In 1967 they employed more than 1,100,000 persons and had sales of over 23 billion. They received over 80 percent of the procurement dollars spent each year by the Department of Defense and the National Aeronautics and Space Administration for aerospace goods and services.

3. There is a vitally close relationship between the aerospace industry and the defense of the United States, and there is a close technical interdependence among the aerospace manufacturers, their subcontractors and the government agencies and military services with which they deal -- all of whom must operate under closely coordinated

time schedules. Yet the manufacturers and their subcontractors and customers, including various components of government agencies and of the military services, are widely dispersed within the United States. Typically, the administrative offices of a company may be in one section of the United States, the production plants working on a government contract in one or more other sections, testing facilities in still another section and subcontractors widely dispersed throughout the nation. Data processing -- often by means of computers situated far from the source of accumulation of the data -- is essential for purposes of production, inventory, payroll and other controls. Engineers, production and testing personnel must be in constant voice communication. Design and engineering plans must be readily transmittible by means of facsimile. Therefore, the aerospace industry and the security of the United States are specially dependent upon and in need of rapid, efficient and economical means of transmission of information between designated points, including voice, teletypewriter, facsimile, data for computer processes, signaling, metering, etc.

4. Telpak services currently offered by AT&T provide such large capacity communication facilities between designated points. The services offered by AT&T in the Telpak tariff includes communication paths of various widths which are capable of transmitting the various forms of electrical communication described in paragraph 3 hereof. In conse-

quence, member companies of AIA are large users of Telpak and, pursuant to existing tariffs, pay more than \$5.3 millions per year (excluding terminal costs) for Telpak services. Because of the impact of Telpak tariffs upon the economics and efficiency of the aerospace industry, AIA petitioned to intervene and was granted authority to intervene in Docket No. 17457.

5. The interests of the aerospace industry in general and of the members of AIA in specific, are vitally affected by the increases in Telpak rates which would be effectuated by Transmittal No. 10001. Although the precise impact has not yet been calculated, it is presently estimated that if the increases provided for in Transmittal No. 10001 go into effect they will increase Telpak rates for member companies of AIA from about \$5,300,000 to over \$8,000,000, or approximately 65%. These figures do not include greatly increased terminal charges.

CHRONOLOGY OF PROCEEDING

6. The extraordinary nature of the AT&T filing and the need for unusual relief have been made clear in petitions and applications filed by the Air Transport Association of America, Aeronautical Radio, Inc., United Airlines, Inc., The Associated Press and Twin Coast Newspapers and the American Trucking Association, Inc., all parties to Docket No. 16258. These petitions and applications contain

^{1/} American Telephone and Telegraph Company and the Associated Bell System Companies, Charges for Interstate and Foreign Communication Service.

detailed statements of the relevant facts and authorities and set forth the relationship between the increased rates which would be effectuated by the filing and the proceedings in Docket No. 16258. Although AIA is not a party to Docket No. 16258, it is a party to this Docket, No. ^{2/}17457, now pending. Very similar issues and considerations bear upon the relationship between the increased rates which would be effectuated by the filing and the issues now under consideration in Docket No. 17457. This petition is designed to set forth the nature of those issues and considerations and therefore to place before the Commission additional reasons for Commission action of the nature requested in previously filed applications and petitions, but with respect to Docket No. 17457.

7. The chronology and relationship of the various prior and current proceedings before the Commission and litigation relating to Telpak services is set forth in the petitions and applications referred to above. In the interest of brevity it is not repeated here, except with respect to matters directly relevant to the Telpak sharing proceeding, Docket No. 17457.

8. By Memorandum Opinion and Order, dated May 19, 1967, the Commission instituted an investigation into the lawfulness of the sharing provisions of the relevant tariffs of AT&T and the Western Union Company. 8 F.C.C. 2d 178. A concurring opinion, in which three of the

^{2/} In the Matter of Telpak Sharing Provisions and American Telephone and Telegraph Company and The Western Union Company.

Commissioners joined, stressed the need for ". . . the most speedy official action that is consistent with applicable law". 8 F.C.C. 2d at 182. In view of the context and background of the Commission's order and the tone of the opinions, the Hearing Examiner stated, at the pre-hearing conference held on June 13, 1967, that he "feels strongly that he is under a mandate, whether the Commission specifically spelled it out in the Memorandum Opinion and Order or not, to do all in his physical power to expedite this proceeding." He expressed hope that ". . . maybe we have a fighting chance of getting finished and closing the record, say, by the Christmas holidays."^{3/}

9. It was clear to all concerned that the reasonableness of any particular rates, existing or proposed, would have to be determined by a complex of factors, including the amount of sharing which might be allowed. Thus, in subsequently filed testimony AT&T witnesses stressed the impact of expanded sharing upon the increase in average Telpak fills, the corresponding adverse affect upon "the TELPAK cost-revenue relationship",^{4/} and the increase in "average full additional costs."^{5/} There was accordingly, no doubt in the minds of any of the parties to the proceedings in Docket No. 17457 of the need for an expeditious disposition

^{3/} Tr., Vol. 1, pp. 22, 36.

^{4/} Testimony of Walter B. Kelley, F.C.C. Docket No. 17457, Bell Exhibit No. 1, p. 18.

^{5/} Testimony of Charles H. McCarthy, F.C.C. Docket No. 17457, Bell Exhibit No. 2, p. 3.

of the sharing issue. Nevertheless, as is detailed below, AT&T's course of conduct in the proceeding operated to prevent such a necessary expeditious resolution of the matter.

10. Consistent with the need for speed, the Hearing Examiner scheduled the pre-hearing conference for June 13, 1967, and the hearing itself to commence on July 26, 1967. Even before then, on June 6, 1967, the Common Carrier Bureau addressed letters to AT&T and Western Union requesting information relative to the hearing. Moreover, in the pre-hearing conference, counsel for AT&T expressly recognized the nature of the situation when he stated to the Examiner ". . . we are aware of the interest in expedition which you have already mentioned. . .".^{6/} Nevertheless, he also suggested deferring the hearing date until AT&T obtained clarification of the week-old information request that had been made by the Common Carrier Bureau. As a result of this request for clarification, the date AT&T and Western Union were required to exchange their direct testimony cases with other parties was extended to on or before August 21, 1967, and the date for commencement of the hearing was extended to September 11, 1967.^{7/}

11. However, this extended schedule was not met. On August 9, 1967, AT&T moved for further extensions because of the heart attack and hospitalization of the individual who was to be its cost witness. The

^{6/} Tr., Vol. 1, p. 26.

^{7/} Tr., Vol. 1, pp. 38-45.

motion was unopposed by the parties, and, by order issued August 16, 1967, the date for exchanging the direct testimony of AT&T and Western Union was postponed to October 9, 1967, and the date for the commencement of the hearing was postponed to October 30, 1967.

12. In form at least, the obligations of the carriers were met. AT&T and Western Union did exchange their direct cases testimony on October 9, 1967, and a hearing was held on October 30, 1967. However, the nature of the testimony exchanged by AT&T was characterized by Commission counsel as so "very sparse" that he did not feel it possible to undertake useful cross examination.^{8/} He had already announced that, having completed its review of the carriers direct cases and "[i]n the light of such review" the Common Carrier Bureau had addressed a letter to the carriers on October 26, 1967, requesting them to disregard the Common Carrier Bureau's original request and to submit additional information.^{9/} Because of the difficulty of proceeding in these circumstances and the fact that the Hearing Examiner's schedule was now filled for most of November and December, the date for the exchange of the additionally requested information from the carriers was fixed for December 15, 1967, and a new hearing was set for January 15, 1968.^{10/} It should be noted that counsel for AIA had throughout objected and expressed concern about the delays.^{11/}

^{8/} Tr., Vol. 2, p 87.

^{9/} Tr., Vol. 2, pp 68-69

^{10/} Tr., Vol. 2, pp. 81-91, 103, 109-110.

^{11/} Tr., Vol. 1, p. 33; Vol. 2, pp. 90-91.

13. In view of the lengthy delays that had occurred and the obvious benefits which could accrue if litigation could be avoided and if the difficult and complex matters involved could be compromised, counsel for a number of the intervenors in Docket No. 17457 entered into off-the-record discussions with representatives of AT&T toward the end of the period between October 30, 1967, and January 15, 1968, concerning the possibility of compromising the matter. That such off-the-record discussions took place is noted on page 8, paragraph 12, of the opposition which AT&T filed on February 9, 1968, to the various petitions and applications filed by parties to Docket No. 16258 and referred to above. However, contrary to the implication there contained, nothing was said in the course of those discussions which led counsel for the intervenors to believe that any Telpak rate increase was imminent. Rather, in view of the testimony of AT&T witnesses in Docket No. 16258, ^{12/} which indicated that Telpak rate increases would be deferred, counsel were under the impression such increases were in fact not imminent. Thus, one possibility discussed by the parties was the total elimination of Telpaks C and D and their replacement by a new rate or service for bulk communications. ^{13/} Yet the fact of the matter is that cost and revenue considerations bulked large in both the off-the-record discussions and in much of the planning that had gone into the preparation of testimony

^{12/} See pages 15-16, paragraphs 23 and 24, of the Petition of the Air Transport Association of America, referred to above.

^{13/} Tr., Vol. 4, p. 165.

of witnesses for intervenors, including AIA. In these circumstances an imminent increase in rates was crucial to any consideration of compromise.

14. The fact that compromise discussions had been engaged in was disclosed to other interested parties prior to the hearing of January 15, 1968, and the Examiner encouraged the parties to pursue the possibility, before lengthy proceedings were entered into, of determining if there was ". . . any possibility that this case could be adjusted in some way . . .".^{14/} Because of the lack of clarity as to the status of compromise negotiations and as to whether compromise or adjustment of the matter was in fact a realistic possibility, the January 15, 1968, hearing was adjourned until Friday, January 19, 1968, at which time^{15/} a report was to be made to the Examiner.

15. Although the various parties were most conservative as to the possibility of reaching a compromise when the hearing was reconvened on January 19, 1968, the Examiner was advised that the likelihood was thought to be sufficient to justify some delay and further consideration, particularly study by AT&T of two alternative plans. One of these involved the elimination of Telpaks C and D and the restructuring of "its existing private line tariffs along the lines of a block [sic] rate tariff" and the other the extension of existing sharing

^{14/} Tr., Vol. 3, p. 148.

^{15/} Tr., Vol. 3, pp. 158-160.

provisions subject to conditions relating to bulk use, minimum user commitments, the same line of business and grandfathering of existing ^{16/}users. A delay of six weeks or more was suggested while AT&T studied the two proposals and reported back from time to time as to its progress to an interim committee of counsel. Accordingly, the hearing was recessed until Monday, March 18, 1968, unless otherwise ordered as ^{17/}a result of the information supplied in the interim reports.

16. During the course of the hearing on Friday, January 19, 1968, counsel for one of the intervenors suggested that the AT&T studies ^{18/}of the feasibility of compromise "should be based upon existing rates." In response, counsel for AT&T stated "that the proposed rate changes in Telpak are so significant that we could not fail to take them into account ^{19/}in making these studies." It is apparently this statement that is characterized in AT&T's opposition of February 9, 1968, as a repetition ". . . on the record in the hearing session held on Friday, January 19 . . . " of the alleged previous ". . . warning concerning the significance of the proposed rates . . . " ^{20/}As noted above, counsel for the intervenors who had engaged in off-the-record discussions with AT&T representatives were not in fact aware that they had been "warned" earlier. Nor, to the

^{16/} Tr., Vol. 4, pp. 165-168.

^{17/} Tr., Vol. 4, pp. 185-190.

^{18/} Tr., Vol. 4, p. 175.

^{19/} Tr., Vol. 4, p. 181.

^{20/} AT&T Opposition, supra, p. 8, para. 12.

best of our knowledge, did any counsel representing intervenors at the hearing on Friday, January 19, 1968, grasp the Delphic significance as a "warning" of the remark made by AT&T's counsel. Rather, in context, the remark was understood, as it was by the Hearing Examiner, who followed it with the comment that consideration of potential rate increases as well as existing rates would be appropriate in the course of study and consideration of a possible compromise solution, because "nobody should lock himself into any particular position along the way . . .". The Examiner then further admonished the parties that if compromise negotiations were to succeed: "I think the cards should all be put on the table face up and let us see what happens."^{21/} This admonition was delivered by an official of the Commission in the course of an official Commission proceeding on Friday, January 19, 1968. Counsel for AT&T made no reply; but on Monday, January 22, 1968, the rate increase was announced.

THE POWERS OF THE COMMISSION
IN THE CIRCUMSTANCES

17. The foregoing chronology illustrates the fact that from the outset of Docket No. 17457 all concerned have recognized the need for an expeditious proceeding in the light of the impact of sharing upon both the existing Telpak rate structure and upon any possible increase. The need for speed has been expressed by three Commissioners, by the

^{21/} Tr., Vol. 4, p. 181.

Hearing Examiner and on behalf of AT&T . Nevertheless, the progress, if any, has been infinitesimal. AT&T's conduct has prevented the orderly and efficient processes of administration under the Communications Act of 1934, as amended, and particularly the effectuation of the Commission's duty to determine whether charges, practices, classifications and regulations of common carrier services are just and reasonable.

18. In these circumstances the Commission's powers are adequate to protect the public interest, to vindicate the integrity of its own processes and to protect the equities of the Telpak users. These powers are not limited to a mere suspension of rates for a three-month period under Section 204 of the Act, after which the increased rates may go into effect.

19. Section 4(i) of the Act provides that:

"(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."

And Section 4(j) provides that:

"(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice"

1. a brief recently filed by the Solicitor General in the Supreme Court, which was also signed by the General Counsel of the Commission, the Communications Act is described as a "comprehensive statutory scheme"; and Section 4(i) is interpreted as one of a number of "sweeping grants" contained in

the Act which "cannot be read in a niggardly fashion."^{22/} In consequence, language such as that contained in Sections 4(i) and 4(j) is read by the Commission as adequate to meet the needs of the instant situation.

20. Thus, in Niagara Mohawk Power Corp. v. Federal Power Commission, 379 F. 2d 153, 158 (C.A.D.C. 1967), it was pointed out that such provisions "are not restricted to procedural minutiae, and that they authorize an agency to use means of regulation not spelled out in detail, provided the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the Act." Similarly in Amerada Petroleum Corp. v. Federal Power Commission, 293 F. 2d 572 (C.A. 10, 1961), certiorari denied, 368 U.S. 936 (1962), the court held a provision of the Natural Gas Act, virtually identical to Section 4(i), to authorize the Federal Power Commission to reject a further rate increase while a prior increase was a subject of suspension investigation.

21. Read together, Sections 4(i) and 4(j) confer substantial supplementary authority upon the Commission, in addition to the authority conferred by Section 204, to issue an order providing that rate increases which operate to interfere with the effectuation of the orderly processes of the Commission under the Communications Act not go into effect until such time as those processes are completed. In the instant case the

^{22/} United States of America and Federal Communications Commission v. Southwestern Cable Co., et al., No. 363, October Term, 1967; Brief for the United States, pp. 36, 45.

relevant process is the completion of the sharing proceeding which is basic to any determination as to whether new Telpak rates will in fact be just and reasonable.

WHEREFORE, the premises considered, petitioner respectfully prays:

(1) That the Commission issue an order directing that the rates charges and practices filed pursuant to AT&T Transmittal No. 10001, shall not go into effect until at least such time as it issues a final order in Docket No. 17457; and

(2) That the Commission grant such further relief as to the Commission may seem just and proper in the premises.

Respectfully submitted,

AEROSPACE INDUSTRIES ASSOCIATION
OF AMERICA, INC.

By /s/ Morton H. Wilner
Morton H. Wilner

/s/ Arthur Scheiner
Arthur Scheiner

Of Counsel:

Wilner, Scheiner & Greeley
1343 H Street, N.W.
Washington, D.C. 20005

/s/ Harold F. Reis
Harold F. Reis

February 21, 1968

Its Attorneys

J I I

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

Revisions of Tariff F.C.C. No. 260
Series 5000 Channels (TELPAK Services)

} Transmittal No. 10001

OPPOSITION

(To Be Acted on by the Commission)

American Telephone and Telegraph Company (AT&T) hereby opposes the "Petition for Temporary Relief" dated February 21, 1968 filed by Aerospace Industries Association of America, Inc. (AIA) and in support of such opposition respectfully states as follows:*

1. AIA's petition requests that the Commission take action to defer the effective date of the proposed new TELPAK rates, filed with AT&T Transmittal No. 10001, until such time as a final order has been issued in the TELPAK sharing case (Docket No. 17457). In support of this request it asserts that a determination as to the reasonableness of the proposed TELPAK rates "can only be

* There have also been filed with the Commission, under the above caption, a "Statement of Association of American Railroads in Support of Petitions for Rejection of Tariff Filing" dated February 19, 1968 and "Petition of the National Association of Motor Bus Owners" dated February 26, 1968. These pleadings merely reiterate or incorporate contentions advanced by other parties which have been fully answered by AT&T's Opposition dated February 9, 1968 and no further response is required.

made in the light of a prior determination concerning the extent of permissible sharing of Telpak facilities" (Pet., p. 1). AIA also contends that AT&T has, by dilatory tactics, prevented an expeditious resolution of the issues in Docket No. 17457.

2. It would be a sufficient answer to AIA's petition to point out that the Commission lacks power to grant the relief requested. In asserting the existence of such a power AIA merely repeats arguments which have already been made by other parties and answered in AT&T's Opposition dated February 9, 1968. Accordingly the points made in that Opposition are incorporated herein by reference. Although dismissal of the petition on this ground alone is justified, some further comment regarding the other allegations in AIA's petition is called for.

3. AIA argues that a final order disposing of the issues in Docket No. 17457 is necessary before there can be a determination of the reasonableness of the proposed TELPAK rate revisions. This, of course, is not correct. It is true that the proposed TELPAK rate revisions have been formulated on the assumption of a continuance of existing sharing regulations and that the Commission determinations in Docket No. 17457 might ultimately affect that

assumption. But the possibility that this might be the outcome would not constitute an adequate ground for rejecting TELPAK rate revisions which are now otherwise clearly justified.

4. AIA's contention that AT&T has deliberately pursued dilatory tactics in Docket No. 17457 with the object of preventing an expeditious resolution of the issues in that docket is astonishing, not only because it is completely erroneous, but also because the charge is totally unsupported by the record. Even those extracts from the record selected by AIA clearly demonstrate that, with the exception of the delay occasioned by the sudden illness of AT&T's originally designated cost witness, every postponement of the hearings in Docket No. 17457 has been at the instance of, or for the benefit of, parties other than AT&T.

5. AT&T's direct case was distributed to the parties on the date fixed by the Hearing Examiner and AT&T has been prepared and willing to have cross-examination of its witnesses proceed at each hearing date set thereafter. As AIA states (Pet., para. 13), counsel for several of the intervenors in Docket No. 17457 initiated off-the-record discussions with AT&T concerning the possibility of

WHEREFORE, AIA's petition should be denied.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

By /s/ C. Duane Aldrich
C. Duane Aldrich

Its Attorneys

March 6, 1968

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

In the Matter of)	
)	
THE AMERICAN TELEPHONE AND)	Transmittal No. 10001
TELEGRAPH COMPANY)	Submitted February 1, 1968
Long Lines Department)	
)	
Revisions of Tariff, FCC No. 260)	
TELPAK (Series 5000))	

To: The Commission

PETITION TO REJECT, REQUIRE WITHDRAWAL OR SUSPEND
AND INVESTIGATE AND FOR AN ACCOUNTING BY
EASTERN AIR LINES, INC.

Eastern Air Lines, Inc. ("Eastern") hereby requests rejection, withdrawal or suspension of the effectiveness of those parts of the above-captioned February 1, 1968, tariff filed by the American Telephone and Telegraph Company ("AT&T") that would increase TELPAK C and D channel mileage rates, increase rates for service terminals, reduce from twelve to two the number of telegraph channels having the equivalent of one voice grade channel, reduce the equivalency ratio for 150-baud circuits from 4:1 to 2:1 and increase rates for connecting arrangements. Eastern requests investigation of the lawfulness of the tariff if it is not rejected or withdrawn and further requests that AT&T keep account of such amounts as may be received by reason of such increases.

I

STANDING

1. Eastern, a certificated air carrier, was a party to the Telpak Case, Docket 14251. Eastern now possesses a substantial interest in the American Telephone and Telegraph Company General Rate Investigation, Docket 16258, by virtue of the Commission's consolidation of Docket 14251 into Docket 16258 and, through the Air Transport Association and Aeronautical Radio, Inc., has actively participated in the latter docket.

2. Eastern is authorized and required by the Civil Aeronautics Board to provide regularly scheduled air transportation over established routes between almost every major city east of the Mississippi as well as many smaller cities in that area, plus Seattle and Portland on the Pacific Coast and Corpus Christi, Dallas, Fort Worth, Houston and San Antonio in Texas. Eastern also serves Toronto, Montreal, and Ottawa in Canada, Bermuda, the Bahamas, Puerto Rico and Mexico.

3. Eastern uses TELPAK C and D to link its numerous facilities in this large route system. Executive offices are located in New York and Miami and Eastern's main operating base is Miami. Eastern maintains facilities of various types at 82 airports within the United States and at 15 overseas or foreign airports. In addition, Eastern has facilities of various types such as sales and ticket offices in 118 communities, 97 of which are within the United States and 21 of which are overseas or in foreign countries. Eastern's reservation system utilizes 8 consolidated reservation offices to

serve 163 cities by local or Foreign Exchange service and 180 other cities by Enterprise service. Operations offices are maintained at each of the 82 airports that Eastern serves in the continental United States as well as the 15 airports at overseas and foreign points. There are 24 maintenance facilities within the United States and 6 at overseas or foreign locations.

4. Eastern currently subscribes to almost 9,000,000 unit miles derived from TELPAK. Of this total 645,640 circuit miles are in voice grade channels and 80,309 circuit miles are teletype grade channels. Eastern leases TELPAK service terminals and telephotograph service terminals from AT&T.

5. As shall be later described, Eastern has now become heavily reliant upon TELPAK C and D at reasonable charges to handle the reservations, operations and planning incident to enplanement of more than 17,000,000 passengers annually. The future importance to Eastern of reasonable TELPAK charges is reflected by the number of future passengers Eastern estimates it will serve. Eastern's Economic Planning Department projects that boardings for the year 1968 will approximate 24,000,000 and by 1980 will be between 65,000,000 and 71,000,000 passengers annually. Maintenance and development of the flexible communications system needed in the operation of Eastern's system is now threatened by AT&T's unilaterally increasing various communications costs to Eastern by up to 600 percent.

6. Therefore, Eastern has standing to request rejection, withdrawal or suspension and investigation of the February 1, 1968, tariff not only because it is immediately affected by the proposed doubling of TELPAK charges but because such a radical increase will throw a carefully developed communications system, directly affecting millions of travellers, into disarray.

II.

THE IMMEDIATE DOLLAR IMPACT ON EASTERN

7. The following table illustrates the magnitude of the proposed rate increases:

	For April, 1968		Percent Increase
	<u>Current Tariff</u>	<u>Proposed Tariff</u>	
TELPAK C & D Estimated* Channel Mileage Charges	\$170,000	\$308,261	81%
Terminals	<u>50,800</u>	<u>122,829</u>	<u>142%</u>
TOTAL	220,800	431,090	95%

* Based on January, 1968, Statement from AT&T

These figures do not include the effect of the change in telephone/teletype equivalency, nor the reduction in the equivalency ratio for 150-baud circuits from 4:1 to 2:1 nor the increased rates for connecting arrangements. For example, the effective cost of a single teletypewriter channel will increase more than six times.

8. Eastern, as a regulated common carrier by air, can neither absorb nor pass on to its customers rate increases of the above magnitude or even increases as large as 25% or 50%. Immediate rate increases of such magnitude by a monopoly enterprise for services upon which its customers have come to rely in every facet of their operations should not be allowed by the agency charged with regulating that monopoly. If AT&T is able to justify any rate increase for its TELPAK services, such increases should be effectuated in a phased and orderly manner over a period of years.

Eastern, however, is prepared to prove, in conjunction with other aviation interests, that AT&T is entitled to no rate increases for its TELPAK services. In view of the pendency of Docket 16258, where the aviation parties have participated in good faith and at great expense and are prepared to prove the proper principles governing TELPAK rates, the Commission should reject or compel the withdrawal of AT&T's tariff filing for the reasons set forth in the petition filed by the Air Transport Association on January 30, 1968.

Eastern also concurs in the petition filed by the Department of Defense on March 1, 1968. It is simply not possible for business or the government to absorb in one stage rate increases of the magnitude proposed by AT&T even if they were fully justified. Eastern's fares and rates

are fully regulated by the Civil Aeronautics Board. Eastern has not achieved the rate of return permitted by that agency in this decade. In fact, in most of the years of this decade Eastern has suffered enormous losses. Eastern has in the last few years achieved a precariously profitable position. This position, however, is now threatened by rising costs and lower yields caused by reduced fares and rates which have, in many instances, been urged or required by the agency which regulates Eastern. On the other hand, AT&T has consistently earned a substantial rate of return which at times has exceeded that which this Commission has found to be just and reasonable. Despite its financial position, Eastern could not contemplate seeking from the agency which regulates it a 100% or even a 25% rate increase to take effect at one time. AT&T, however, despite its immeasurably superior financial position here seeks almost a 100% rate increase.

This Commission is compelled, to avoid serious dislocations to industry and the government, to reject or compel the withdrawal of the subject tariff or, at a very minimum, to require the postponement of its effective date for one year as it has heretofore done in connection with other rate increases filed by AT&T at the same time.

III

RESULTING ECONOMIC WASTE IN THE DISRUPTION
AND PARTIAL LIQUIDATION OF A CAREFULLY
DEVELOPED COMMUNICATIONS SYSTEM

9. Before TELPAK Eastern used only a few private line telephone grade circuits. Inter-city communications were carried on in general by teletype supplemented by the use of the message toll service where absolutely necessary, as for example where flight safety was concerned. The expansion of Eastern's use of communications common carrier services since 1961 is a direct result of the availability of TELPAK service. A decision was made not to participate in a commonly-owned private microwave system because Eastern was convinced that the TELPAK offering would satisfy its communications needs economically and would avoid the large structural shift in turning to a private system. Fundamental to that decision was the assumption that AT&T would increase its rates, when necessary and justifiable, in an orderly gradual fashion as other common carriers regulated by the Federal Government do.

10. The use of communications on Eastern's system as a result of the TELPAK offering is so pervasive that it is difficult to describe all such uses. The following examples, however, illustrate functions which depend upon the availability of TELPAK at present rates.

A. Reservations. TELPAK has permitted an efficient centralization of Eastern's reservation system. Eastern's computer stores and updates seat inventory information for each segment of each of Eastern's scheduled flights. TELPAK communication lines connect the computer to 1,120

agent sets located in Eastern's eight reservation centers in Charlotte, New York, Montreal, Miami, Tampa, Atlanta, Chicago and Houston. Employees use the agent sets to request seat availability and other information and to perform up to forty-eight separate transactions. When a passenger dials an Eastern reservation number and is immediately connected with one of the eight centers, TELPAK is used.

B. Technical Services. Technical Services, a unit of Maintenance, controls the unscheduled maintenance problems that occur in day-to-day operations. The availability of the dial tieline system and the Private Line Telephone are essential to efficient function of this department. There are 15,000 telephone and PLF calls to and from Technical Services each month. The PLF line serves daily maintenance conferences. At least 25,000 teletype messages are originated or received in Eastern's Control Center each month.

C. Meteorology. Through TELPAK an Eastern captain can receive an immediate response to inquiries on weather conditions. Through TELPAK and a facsimile transmitter, Eastern's Central Meteorological Office is able to transmit weather maps, flight cross sections, hazardous warning areas, et cetera, to each of nine receiving installations located coast to coast throughout the Eastern system. Special alerts can be transmitted orally to flight crews or by teletype to every continental station.

D. Dispatch. Dispatch is charged by a panoply of federal regulations for the safe operation of every Eastern flight. An absolutely free

flow of information on all facets of each flight's operations is required. Dispatchers use the following facilities most of which are provided within TELPAKS:

1. The Eastern dial tieline system for:
 - a. Exchanging information with ground personnel at each of the airports in the United States and Canada served by Eastern.
 - b. Consultation with the captain of a flight prior to his departure.
 - c. Discussing short and long-range weather forecasts with Eastern's Meteorology Department.
 - d. Contacting various governmental agencies (FAA towers, airport authorities, Air Route Traffic Control Centers, etc.) in potential or existing in-flight emergencies.
 - e. Obtaining information from Eastern's Univac 494 computers in Charlotte, using touchtone.
 - f. Adjusting Flight Watch Display records in the Univac 494 computers by touchtone.
2. The Eastern central teletypewriter system for:
 - a. Issuing individual authorization for each and every flight on the system.
 - b. Receiving periodic weather forecasts (surface and aloft) from the Meteorology Department.
 - c. Distributing flight advisory messages, as required, to all those needing them.
 - d. Advising station personnel of heavier-than-normal fuel requirements.
 - e. Confirming instructions and information previously issued or received via telephone.

3. Private telephone lines between Dispatch Offices and various ARINC stations for Dispatcher-Captain consultation when the flights are in the air.
4. Private lines between each Dispatch Office and the Miami Planning Center, so that:
 - a. The dispatcher may advise the planner of factors which will, or may, require adjustments to the operational plan.
 - b. The planner can inform the dispatcher of necessary deviations from normal operations.
5. A full-period telephone circuit, with drops in the Miami Planning Center, both Dispatch Offices, Aircraft Routing Control, and twenty of our major stations.
6. Another full-period telephone circuit with drops in the Miami Planning Center, each Dispatch Office, the EAL System Forecaster, and Eastern's four Meteorology Offices. This is routinely used at fixed periods throughout the day for briefing all dispatchers and planners on expected weather conditions over our system.
7. An automated Flight Watch Display system, permitting each dispatcher to keep informed on the progress of every flight under his control by visually scanning the display. This display gives the dispatcher a summary of information needed on each flight for operational control.
8. Eastern's central teletype system is used to feed information to the Univac 494 computers in Charlotte. The computers process the information and redistribute the information to:
 - a. Ground stations, via the central teletype system.
 - b. The controlling Dispatcher(s), via special teletype circuits.
9. Other special teletype circuits are used to provide ARINC stations from Seattle to New York to Miami the capability of rapid input of radio messages from flights in the air to the Univac 494 computers. The computers, in turn, process and distribute the information as above.

E. Planning. The Miami Planning Center has been established to increase operational efficiency by obtaining maximum utilization from available aircraft and crews, under existing and anticipated weather and airport field conditions. TELPAK usage consists of:

1. Private telephone lines between the Planning Center and each Dispatch Office to:
 - a. Exchange operational information.
 - b. Issue necessary instructions to implement an operational plan.
2. A full-period telephone circuit between the Planning Center and twenty of our major stations, for:
 - a. The stations to advise the Planning Center of any difficulties with aircraft or crews; changes in terminal weather, airport conditions, traffic delays, and any other pertinent non-routine events.
 - b. The Planning Center to concur with extended departure delays (no major station can establish a flight delay of thirty minutes or more without the concurrence of the appropriate planner), co-ordinate abnormal operations with the affected stations, and request any other information needed.
3. A full-period telephone line between the Planning Center, Dispatch and our Meteorology Offices. In addition to the routine weather briefings, special consultations are held as needed to discuss major snow storms, hurricanes and unexpected widespread weather developments.

This telephone circuit also has drops in all crew scheduling offices for consultation between these offices and the Miami Planning Center.
4. The dial tieline system for:
 2. Touchtone inquiries to our Univac 494 computers in Charlotte for passenger booking information and flight

progress information on any Eastern flight. Response to these inquiries comes over special teletype circuits direct from the Charlotte computer.

- b. Discussing possible protection for our passengers on delayed or cancelled flights.
 - c. Consulting with any Eastern station on existing or possible operational problems.
 - d. Contacting those individuals in Eastern who have, or can obtain, information needed for formulating an efficient operating plan.
5. The central teletypewriter system, for:
- a. Transmitting written instructions for executing an operational plan.
 - b. Receiving information of all types—field condition reports, crew status messages, et cetera.
 - c. Issuing flight information messages to the field. These messages may also be sent to the Univac 494 computers, where they automatically update Dispatch Flight Watch Display records and flight information displays used by our Reservations Agents.

11. If the new rates become effective, the present and future operational systems will have to be examined to determine which proposed automated systems must be abandoned and which present systems shall be eliminated or reduced in scope. One possible result may be the construction of many new and smaller reservations offices to serve smaller geographic areas. Investment of many millions of dollars in new construction will be necessary and loss of much of Eastern's investment in existing facilities will result. Since Eastern believes that the rate increases will cause

Eastern to attempt an equally large reduction in AT&T's services, other means of satisfying requirements will have to be found.

IV.

THE PROPOSED INCREASE IS
NEITHER JUST NOR REASONABLE

12. The magnitude and staggering effect of the proposed rate increases raise immediate questions as to whether they are just and reasonable. AT&T cannot support the reasonableness of the proposed rates, without knowing first what rate-making principles, factors and relationships must be considered in developing its revenue requirements from TELPAK C and D and hence the level of rates for that class of service. Determination of the appropriate rate-making principles and factors is at issue in the AT&T General Rate Investigation, Docket No. 16258. Therefore, the supporting statement from the tariff quoted below, cannot be verified by AT&T:

"Experience with the market development of TELPAK has shown that a substantial increase in the level of the rates for TELPAK C and D is necessary to achieve an improvement in the cost revenue relationship for this service." 1/

Examination of the revenue requirement issue outside of Docket 16258 would produce a confusing and wasteful duplication of effort when the focus of all parties should be the creation of proper alignment in AT&T's overall rate structure.

1/ Tariff F.C.C. No. 260, page 1, February 1, 1968. (Emphasis

13. The effective date of these rate increases should at least be postponed for one year because of the otherwise unjust discrimination among classes of users. On March 1, 1968, AT&T agreed, at the request of the Common Carrier Bureau to postpone until April 1, 1969, increases in charges for private line program and video transmission service. There has been no Commission determination in favor of the competitive necessity for existing program service rates as in the case of TELPAK C and D and there is not a reopened, remanded, and relitigated issue as to the compensatory nature of present program rates as there is in the case of TELPAK C and D.

14. The unjust discrimination is doubly offensive in light of evidence in Docket 16258 tending to show that the return from TELPAK C and D now being received and to be received by AT&T is much greater than that received for services offered the broadcasters:

	Present Rates	
	Full Additional Costs (Millions)	Annual Revenue (Millions)
Video	60.4 ^{2/}	44.3 ^{2/}
Audio	26.4 ^{3/}	22.7 ^{3/}

While AT&T has not supplied the full additional costs of TELPAK C and D and revenues therefrom under present rates, Mr. Froggatt has stated for

^{1/} Federal Communications Commission, Report No. 2782, March 1, 1968.

^{2/} Bell Exhibit 24A, revised September 22, 1967, Docket 16258, Attachment D, page 1.

^{3/} Bell Exhibit 24A, revised September 22, 1967, Docket 16258.

AT&T that TELPAK revenues have covered costs from 1961 to the ^{1/} present.

Even had AT&T not postponed the effectiveness of the rate increase on services offered the broadcasters, the future rate of return from TELPAK would have far exceeded the future rate of return from audio and video offerings:

	Proposed Rates		
	Full Additional Costs (Millions)	Annual Revenue (Millions)	Ratio Between Profit and Costs
TELPAK	193.7 ^{2/}	240.0 ^{2/}	23.9%
Video	60.0 ^{3/}	64.6 ^{3/}	7.7%
Audio	25.9 ^{4/}	27.0 ^{4/}	4.2%

^{1/} Docket 16258, Transcript page 10590.

^{2/} Bell Exhibit No. 24C, filed December 12, 1967, Docket 16258, p. 1.

^{3/} Id., Attachment D.

^{4/} Id., Attachment E.

WHEREFORE, Eastern respectfully requests that the Commission reject, require withdrawal, or suspend the effectiveness of those parts of AT&T Transmittal 10001 dated February 1, 1968 which increase TELPAK C and D channel mileage rates, increase rates for service terminals, reduce from twelve to two the number of telegraph channels having the equivalent of one voice grade channel, reduce the equivalency ratio for 150-baud circuits from 4:1 to 2:1 and increase rates for connecting arrangements. Eastern requests investigation of the lawfulness of the tariff if it is not rejected or withdrawn and further requests that AT&T keep account of such amounts as may be received by reason of such increases.

Respectfully submitted,

REAVIS, POGUE, NEAL & ROSE

By: /s/ Calvin Davison
Calvin Davison

By: /s/ W. N. Harrell Smith
W. N. Harrell Smith

1100 Connecticut Avenue, N. W.
Washington, D. C. 20036

Attorneys for
Eastern Air Lines, Inc.

March 11, 1968

March 13, 1968

Application No. 643

Secretary
Federal Communications Commission
Washington, D. C. 20554

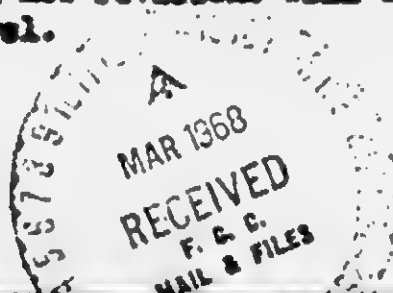
Attention: Common Carrier Bureau

Application is hereby made for special permission to withdraw the tariff revisions filed with the Federal Communications Commission on February 1, 1968 by Transmittal No. 10001 and on March 1, 1968 by Transmittal No. 10046, and for that purpose a waiver of Section 61.59 of the Commission's Rules is requested.

The tariff revisions referred to above which provide for changes in regulations and rates for TELPAK (Series 5000) service, were filed to become effective April 1, 1968. This special permission is being requested in order to permit the withdrawal of such revisions and the substitution of modified TELPAK rate revisions to become effective June 1, 1968 on an interim basis. This new filing would include the revised regulations originally filed with Transmittal No. 10046 which permit a customer to order additions to TELPAK base capacity from either the Telephone Company or the Western Union Telegraph Company without regard to which carrier initially furnished such Base Capacity.

It is our view that the TELPAK rate levels embodied in our tariff revisions filed on February 1, 1968 are fully justified by the relevant cost and market considerations referred to in our Transmittal No. 10001. Nevertheless, we recognize that the impact on our customers of these proposed changes is, in many cases, very substantial, and that in some cases customers have indicated that required rearrangements cannot be made by April 1.

In the circumstances we propose to withdraw the tariff revisions now scheduled to become effective April 1, 1968 and to file a new set of revisions which will provide for a lesser increase in the level of TELPAK rates. We believe that in any Commission investigation it will be demonstrated that TELPAK rates should be established at substantially the level of those which were filed to become effective April 1, 1968. The proposed new revisions will constitute an intermediate step in achieving that level.



MAR 14 1968
COMMON CARRIER BUREAU

The principal proposed intermediate rate modifications are as follows:

	<u>Per Airline Mile Per Month</u>
Base Capacity - TELPAK C (Type 5700)	\$28.00
TELPAK D (Type 5800)	\$60.00

	<u>Per Month</u>
Service Terminals -	\$25.00
- Additional Terminals	\$10.00

Telegraph/Telephone equivalency - 6 to 1	
150 Baud " - 3 to 1	

In view of the evidence already submitted to the Commission indicating the need for an increase in the level of TELPAK rates, we do not believe there should be any question concerning the propriety of such rates.

Attached is a Telephone Company draft in the amount of \$10.00 to cover the fee prescribed by the Federal Communications Commission for filing this application.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

R. B. Nichols RD

Administrator Rates and Tariffs

Attachments:
Copy of Letter
\$10 Draft

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

LONG LINES DEPARTMENT

32 AVENUE OF THE AMERICAS

NEW YORK, N. Y. 10013

R. D. NICHOLS
ADMINISTRATOR, RATES AND TARIFFSAREA CODE 212
393-7277

March 25, 1968

Transmittal No. 10069

Secretary
Federal Communications Commission
Washington, D. C. 20554Attention: Common Carrier Bureau

The accompanying tariff material, issued by the American Telephone and Telegraph Company, Long Lines Department, is sent to you for filing in compliance with the requirements of the Communications Act of 1934, as amended. This material consists of revised tariff pages as indicated on the following check sheet, and is issued to become effective June 1, 1968, except as otherwise indicated therein:

<u>Tariff</u> <u>F.C.C. No.</u>	<u>Check Sheet</u> <u>Revision No.</u>
260	446th

This filing under authority of Special Permission No. 5253 of the Federal Communications Commission provides:

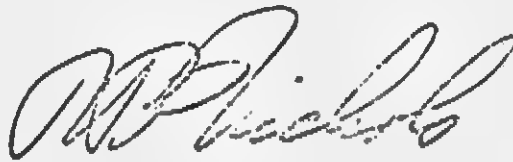
- (1) For the cancellation of the tariff revisions filed on February 1, 1968 by Transmittal No. 10001 and on March 1, 1968 by Transmittal No. 10046 which were to become effective April 1, 1968.
- (2) For the establishment of revised rates for THEPAK Series 3000 to become effective June 1, 1968 providing for a lesser increase in the level of such rates than provided for in the cancelled revisions.
- (3) For refiling regulations originally filed under Transmittal No. 10046 which permit a customer to order additions to THEPAK base capacity from either the Telephone Company or the Western Union Telegraph Company without regard to which carrier initially furnished such Base Capacity. Such regulations to become effective June 1, 1968.

Federal Communications Commission

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- (4) For refiling material relative to 50 Kilo-bit Switched Service filed under Transmittal No. 10029 so that those revisions will become effective April 1, 1968 as originally scheduled.

Acknowledgment and date of receipt of this filing are requested. A duplicate letter of transmittal is attached for this purpose. All correspondence and inquiries in connection with this filing should be addressed to Mr. R. B. Nichols, Administrator Rates and Tariffs, American Telephone and Telegraph Company, 32 Avenue of the Americas, New York, N. Y. 10013.



Administrator Rates and Tariffs

Attachments:

Duplicate Letter
Tariff Pages

PRIVATE LINE SERVICE

CHECK SHEET *

Pages 1 to 361 inclusive of this tariff are effective as of the dates shown. Original and revised pages as named below and Supplement Nos. 1, 3, 4 and 5 (S)(x) contain all changes from the original tariff that are in effect on the date hereof.

Page	Number of Revision Except as Indicated	Page	Number of Revision Except as Indicated	Page	Number of Revision Except as Indicated	Page	Number of Revision Except as Indicated	Page	Number of Revision Except as Indicated
Title	3rd	1	1st	91A	Original	131A	Original	163	7th
1	446th*	53	1st	92	3rd	132	3rd	164	3rd
1.1	129th	54	4th	92A	Original	132A	Original	164.1	3rd
3	1st	54.1	Original	93A	Original	133A	Original	164.2	3rd
5	1st	54.2	2nd	94A	Original	134	1st	165	1st
6	1st	55	4th	95	1st	134A	Original	166	6th
8	11th	55.1	Original	95A	Original	135A	Original	166.1	4th
8.1	3rd	56	4th	96A	Original	136A	Original	167	3rd
9	8th	57	4th	97A	Original	137	2nd	167.1	6th
10	4th	57.1	2nd	98	1st	137A	Original	168	1st
11	1st	58	4th	98A	Original	138A	Original	169	6th
12	2nd	58.1	Original	99	2nd	138.1	Original	170	8th
13	2nd	59	2nd	99A	Original	138.1A	Original	170.1	3rd
14	2nd	60	1st	100A	Original	139	1st	170.2	2nd
14.1	Original	60.1	Original	101A	Original	139A	Original	171	10th
15	1st	62	2nd	102	2nd	139.1	2nd	171.1	6th
16	1st	63	1st	102A	Original	139.2	3rd*(y)	171.2	Original
17	2nd	64	2nd	103	2nd	139.3	5th*(y)	172	6th
18	10th	65	2nd	103A	Original	139.4	1st	172.1	Original
18.1	3rd	66	3rd	104A	Original	139.5	1st	173	5th
19	2nd	66.1	1st	105	1st	139.6	Original	174	3rd
20	2nd	67	1st	105A	Original	139.7	2nd	175	3rd
21	1st	68	1st	106A	Original	139.8	2nd	176	4th
22	4th	69	4th	107	1st	139.9	4th*(y)	177	3rd
23	1st	70	2nd	107A	Original	139.10	3rd*(y)	177.1	1st
23.1	Original	71	2nd	108	1st	139.11	Original	178	4th
25	1st	71.1	1st	108A	Original	140	1st	178.1	Original
26	3rd	72	3rd	109A	Original	141	1st	179	3rd
26.1	Original	73	3rd	110A	Original	142	2nd	180	8th
27	1st	74	2nd	111A	Original	143	4th	181	3rd
28	4th	75	1st	112A	Original	143.1	Original	182	2nd
28.1	Original	76	1st	113	1st	143.2	Original	183	2nd
29	3rd	77	4th	113A	Original	143.3	Original	184	7th
30	6th	77.1	1st	114A	Original	144	3rd	185	5th
30.1	3rd	78	5th	115A	Original	145	3rd	186	8th
31	8th	79	3rd	116A	Original	146	1st	187	8th
35	4th	80	6th*(y)	117A	Original	147	1st	188	6th
36	3rd	80.1	5th*(y)	118A	Original	148	1st	188.1	4th
36.1	1st	81	4th*(y)	118.1	Original	149	5th	189	5th
37	1st	81.1	1st	119	2nd	149.1	1st	190	6th
38	1st	82	5th*(y)	119A	Original	151	10th	191	2nd
39	5th	83	4th*(y)	120	3rd	151.1	3rd	192	2nd
40	3rd	83.1	1st*(y)	120A	Original	152	6th	193	8th
40.1	2nd	84	10th*(y)	121A	Original	153.1	Original	194	10th
41	9th*(y)	84.1	8th*(y)	122	1st	153	1st	195	6th
42	1st	84.2	3rd*(y)	122A	Original	154	3rd	196	8th
43	1st	85	5th*(y)	123A	Original	154.1	Original	197	7th
43.1	Original	86	7th*(y)	124	1st	155	1st	198	1st
44	3rd	87	4th*(y)	124A	Original	156	4th	205	3rd
44.1	3rd	87.1	5th*(y)	125A	Original	157	4th	207	1st
45	1st	87.2	Original	126A	Original	157.1	Original	210	3rd
46	3rd	88	6th*(y)	127	1st	158	2nd	211	5th
47	2nd	88.1	3rd*(y)	127A	Original	159	1st	212	5th
47.1	Original	88.2	Original	128A	Original	159.1	3rd	213	2nd
48	2nd	89	2nd	129A	Original	160	3rd	214	3rd
49	1st	89A	Original	130A	Original	160.1	Original	215	5th
50	1st	90A	Original	131	1st	162	8th	216	8th
51	2nd	91	3rd						

* Pages issued March 25, 1968.
(x) Original effective date April 1, 1968.
(y) Contains material to become effective June 1, 1968.

PRIVATE LINE SERVICE

3. CHANNELS (Cont'd)

INDEX (Cont'd)

3.2 Classification and Rates (Cont'd)

3.2.3 Series 3000 Channels

- (A) Types and Description
(1) Type 3001 - Remote Metering, Supervisory Control and Miscellaneous Signaling
(2) Type 3002 - Data Transmission
(B) Regulations
(C) Rates - Monthly Service
(1) Interexchange Channels
(2) Service Terminals
(3) Washington Metropolitan Area Channels
(a) Unconditioned Channels
(b) Standard Telephone Terminations
(4) Channel Arrangements
(a) Station Connection
(b) Extension Service Connection Arrangement

(D) Rates - Temporary Service

3.2.4 Series 4000 Channels

- (A) Types and Description
(1) Type 4001 - Type 5 Data Transmission
(2) Type 4002 - Telephoto (Schedule 2)
(B) Regulations
(C) Rates - Monthly Service
(1) Interexchange Channels
(2) Service Terminals
(3) Washington Metropolitan Area Channels
(a) Channels for Telephotograph Transmission Arranged for P-1 Conditioning
(4) Intraexchange Channels
(5) Channel Arrangements
(a) Channel Conditioning
(b) Extension Service Connection Arrangement

(D) Rates - Temporary Service

3.2.5 Series 5000 Channels

- (A) Types and Description
(1) Base Capacity
(2) Terminating Arrangements
(a) Service Terminals for use as a Wideband Channel
(b) Service Terminals for use as Channels of a Lesser Capacity
(B) Regulations
(1) General
(2) Connections with Facilities of Carriers in Other Countries and of Certain Domestic Carriers
(3) Shared Use of Facilities
(4) Channels and Services Furnished by More Than One Carrier
(5) Interstate - Intrastate Channels and Services
(6) Telephone Company Provided Services and Western Union Telegraph Company Provided Services in the Same Base Capacity

(C) Rates

- (1) Base Capacity
(2) Service Terminals
(a) Service Terminals for use as a Wideband Channel
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(3) Connecting Arrangements
(4) Switching and Selecting Arrangements
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(b) Tone Arrangement
(6) Conditioning
(7) Automatic Calling Unit
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(T)(y)

(x) Effective April 1, 1968 under authority of Special Permission No. 5258 of the Federal Communication Commission.
(y) Material relative to Station Arrangement is now included under (8) Other Items.

PRIVATE LINE SERVICE

3. CHANNELS (Cont'd)

3.2 Classification and Rates (Cont'd)

3.2.5 Series 5000 Channels (Cont'd)

(A) Types and Description (Cont'd)

(2) Terminating Arrangements (Cont'd)

Type numbers for wideband service terminals are shown in (a) following.

Where service terminals for use as individual channels of a lesser capacity are furnished, the Type numbers as shown in (b) following are assigned by reference to the individual channel as if it were furnished under Series 1000, Series 2000, Series 3000 or Series 4000 channels by dropping the second digit of the regular Type number and adding a 5 as the first digit of the new four digit Series 5000 Type number.

EXAMPLE

Series	Type	Equivalent 5000 Series Type
1000	1001	5101
2000	2001	5201
3000	3001	5301
4000	4001	5401

(a) Service Terminals for Use as a Wideband Channel

Type 5701: Service terminals for any one of the following uses. The channel or channels developed by each service terminal require interexchange channel capacity equivalent to twelve voice channels

- to terminate a channel having a frequency bandwidth of approximately 10 to 20,000 cycles per second with only minor deviation in gain and delay characteristics within this frequency range
- to accommodate the transmission of data signals at a rate of 40,800 bits per second in sequence and including one voice channel termination for coordination purposes
- to accommodate the transmission of sequential non-synchronous signals of varying bit lengths at a maximum rate of approximately 50,000 bits per second or synchronous signals at a rate of 50,000 bits per second. Arrangements for terminating a voice channel for coordination purposes are also included.

At the customer's option a supplementary control arrangement will be provided suitable for simultaneously conditioning three signals, one from each of two groups of five possible signals and one from a group of four possible signals, at rates up to 20 such combinations per second for transmission in lieu of, or alternate to, voice use of the coordination channels.

Type 5703: Service terminals for any one of the following uses. The channels developed by each service terminal require the interexchange channel capacity equivalent to six voice channels

- to accommodate the transmission of two-level facsimile signals within the frequency range of approximately 29 to 44 kilocycles per second. Arrangements for terminating a voice channel for coordination purposes are also included.
- to accommodate the transmission of sequential synchronous signals at a rate of 19,200 bits per second. Arrangements for terminating a voice channel for coordination purposes are also included.

(c)(x)

(x)

(y)

(c)(y)

PRIVATE LINE SERVICE

3. CHANNELS (Cont'd)

3.2 Classification and Rates (Cont'd)

3.2.5 Series 5000 Channels (Cont'd)

(A) Types and Description (Cont'd)

(2) Terminating Arrangements (Cont'd)

(a) Service Terminals for Use as a Wideband Channel (Cont'd)

Type 5706: Service terminals arranged to accommodate binary digital baseband signals in a random polar format at the rate of 50,000 bits per second from customer-owned equipment for the transmission of secure communications. Arrangements are also included to accommodate the non-simultaneous transmission of signal and supervisory tones between the frequencies of 300 and 3000 cycles per second. The channels developed by each service terminal require interexchange channel capacity equivalent to 12 voice channels. (T)

These service terminals are furnished to a Department or Agency of the United States Government.

Type 5707: Service terminals to accommodate binary digital baseband signals at the rate of 18,750 bits per second from customer-owned equipment for the transmission of secure communications. Arrangements are also included for terminating one channel suitable for voice transmission alternate to the transmission of secure communications. The channels developed by each service terminal have the total equivalent of 6 voice grade channels.

These service terminals are furnished to a Department or Agency of the United States Government.

Type 5708: Service terminals for channels furnished in connection with 50 kilobit switched foreign exchange service to terminate the channel in a Telephone Company office and to accommodate the transmission of sequential non-synchronous signals at a maximum rate of approximately 50,000 bits per second or sequential synchronous signals at a rate of 50,000 bits per second. Arrangements for terminating a voice channel for voice coordinating purposes are also included. The channels developed by each service terminal have the total equivalent of 12 telephone grade channels. (N)(z)

Type 5751: Service terminals for any one of the following uses. The channel or channels developed by each service terminal require interexchange channel capacity equivalent to sixty voice channels. (N)(z)

- to terminate channels having a frequency bandwidth of approximately 200 to 100,000 cycles per second with only minor deviation in gain and delay characteristics within this frequency range
- to accommodate the transmission of synchronous digital data signals at a rate of approximately 230,400 bits per second or non-synchronous signals of varying bit lengths at a maximum rate of 230,400 bits per second. Arrangements for terminating a voice channel for coordinating purposes are also included. (C)(x)

At the customer's option a supplementary control arrangement will be provided suitable for simultaneously conditioning three signals, one from each of two groups of five possible signals and one from a group of four possible signals, at rates up to 20 such combinations per second for transmission in lieu of, or alternate to, voice use of the coordination channel. (N)

Type 5753: Service terminals arranged to accommodate signals from customer-provided equipment for Type P-1 service. Each channel obtained through the use of these service terminals is equivalent to sixty voice channels. (D)(y)

These service terminals are to be furnished only to a Department or Agency of the United States Government. (D)(y)

(w) Effective April 1, 1968 under authority of Special Permission No. 5258 of the Federal Communications Commission, except that material relative to 50 Kilobit Switched Service now appearing on 4th Revised Page 80.1 which is reissued on this page to become effective April 1, 1968 under authority of Special Permission No. 5258 of the Federal Communications Commission.

(x) Replaces material relative to Types 5751 and 5754 service terminals.

(y) Material relative to Type 5752 service terminals is no longer applicable.

(z) Expires with March 31, 1971 unless sooner canceled, changed or extended. (T)

PRIVATE LINE SERVICE

3. CHANNELS (Cont'd)

3.2 Classification and Rates (Cont'd)

3.2.5 Series 5000 Channels (Cont'd)

(A) Types and Description (Cont'd)

(2) Terminating Arrangements (Cont'd)

(a) Service Terminals for Use as a Wideband Channel (Cont'd)

(D)(y)

(D)(y)

(b) Service Terminals for Use as Channels of a Lesser Capacity

Voice: Service terminals suitable for terminating channels having transmission characteristics and with terminating arrangements similar to those furnished under Series 2000 and Series 3000 (Type 3001 only) channels. The types of Series 5000 voice service terminals are as follows:

Type 5201
Type 5202
Type 5203
Type 5204
Type 5205
Type 5206
Type 5301

Teletypewriter: Service terminals suitable for terminating channels having transmission characteristics and with terminating arrangements similar to those for channels furnished under Series 1000 channels. The types of Series 5000 teletypewriter service terminals are as follows:

Type 5101
Type 5102
Type 5103
Type 5104
Type 5105
Type 5106

Except for Type 5106 channels, six such channels, or any portion thereof, or a combination, not exceeding six, of such channels, between the same pair of service points, have the equivalent of one voice grade channel.

(C)

Three Type 5106 channels or any portion thereof, not exceeding three, of such channels, between the same pair of service points, have the equivalent of one voice grade channel.

(C)

(x) Effective April 1, 1968 under authority of Special Permission No. 5258 of the Federal Communications Commission.

(y) Material relative to Type 5801 service terminals is no longer applicable.
Material relative to Types 5753 and 5754 service terminals is replaced by material shown on Page 80.1

PRIVATE LINE SERVICE

3. CHANNELS (Cont'd)

3.2 Classification and Rates (Cont'd)

3.2.5 Series 5000 Channels (Cont'd)

(A) Types and Description (Cont'd)

(2) Terminating Arrangements (Cont'd)

(b) Service Terminals for use as Channels of a Lesser Capacity (Cont'd)

Data: Service terminals suitable for terminating channels having transmission characteristics and with terminating arrangements similar to those for Type 3002 or Type 4001 channels furnished for data transmission. Each channel has the equivalent of one voice grade channel. The types of Series 5000 data service terminals are as follows:

Type 5302
Type 5401

(B) Regulations

In addition to the regulations set forth in 2. the following regulations apply to Series 5000 channels as set forth below.

(1) General

Except as otherwise provided below, the regulations applicable are as set forth for services of the same type and furnished for the same purposes under Series 1000, Series 2000, Series 3000 and Series 4000 services.

Channels furnished within this series are provided only through the use of Series 5000 service terminals or connecting arrangements provided by the Telephone Company. The customer may not create additional channels from channels furnished under this series except that the customer may create additional channels from channels of voice grade or less to the extent permitted under the provisions of 2.2.6.

Channels provided through the use of Type 5707 service terminals may be used for the remote operation of mobile radiotelephone systems.

Channels and service terminals furnished for purposes specified herein are suitable for such purposes. While other uses are permitted, channels and service terminals are not represented as being satisfactory for other uses.

When a wideband channel is arranged for alternate use as channels of lesser capacity in accordance with (C)(5) following, one voice grade channel will be associated with the wideband service terminal for coordination purposes and this channel may not be suitable for other purposes.

(c)
|
(c)

(2) Connections With Facilities of Carriers in Other Countries and of Certain Domestic Carriers

Base Capacity may be extended to any of the "points of connection" with facilities of Connecting or Other Participating Carriers listed in 5. and to "points of connection" with facilities of Canadian and Mexican Carriers or Administrations under the following conditions:

(a) Where the point of connection is not a service point on the customer's network, each of the following conditions must be met:

- (i) all of the channels arranged for use are of the same grade and used for the same purpose as are offered by the other carrier at the point of connection,
- (ii) all of the channels arranged for use are connected to channels furnished by the other carrier,
- (iii) the channels included in a single Base Capacity are connected to the facilities of only one other carrier at any single point of connection.

(b) Where the point of connection is also a service point on the customer's network, the portion of the Base Capacity arranged for use which is connected with facilities of the other carrier can include only channels of the same grade and used for the same purposes as are furnished by the other carrier.

(x) Effective April 1, 1968 under authority of Special Permission No. 5258 of the Federal Communications Commission.

PRIVATE LINE SERVICE

3. CHANNELS (Cont'd)

3.2 Classification and Rates (Cont'd)

3.2.5 Series 5000 Channels (Cont'd)

(B) Regulations (Cont'd)

(3) Shared Use of Facilities

(a) Shared use is permitted in the case of the following customers:

(1) Pipe line companies, railroad companies, other common or contract carriers or public utilities whose rates and charges are regulated by a government entity, and any nonprofit communications organization of such companies, provided that those involved in such shared use are in the same line of business.

(11) Government agencies (Federal, State and Local).

(b) Charges will be computed as though the facilities were furnished to a single customer and, without affecting the ultimate responsibility for payment of charges, will be allocated for billing purposes among the customers in accordance with percentages specified by them, such percentages to remain in effect for a minimum of one month. Such percentages on file on the first day of any month will be used in computing that month's billing.

(4) Channels and Services Furnished by More Than One Carrier

Where services are furnished under this Series by more than one carrier, charges are determined as if such services were furnished by one carrier.

(5) Interstate-Intrastate Channels and Services

In the following listed states, if a customer has a Base Capacity between two or more exchanges within a single state furnished for use as a number of individual channels of lesser capacity some of which carry interstate traffic and some of which carry only intrastate traffic, the Base Capacity charge for the interstate portion is determined by multiplying the charge computed in accordance with (C)(1) following by the ratio of the number of equivalent voice grade interstate channels arranged for use to the total number of equivalent voice grade channels arranged for use, except that where the charge computed above plus the charge for the intrastate portion of the base capacity is less than the charge computed in accordance with (C)(1) following, the minimum charge for the interstate portion will be the charge computed in accordance with (C)(1) following reduced by the charge for the intrastate portion of the base capacity. Each two-point section is separately computed.

(C)

(C)

For other items associated with such interstate services, the rates specified in (C)(2), (3), (4), (5), (6), (7) and (8) following apply.

(T)

STATES

Alabama	Indiana	Missouri	Oregon
Arizona	Iowa	Montana	Pennsylvania
Arkansas	Kansas	Nebraska	South Carolina
California	Kentucky	Nevada	South Dakota
Colorado	Louisiana	New Jersey	Tennessee
Connecticut	Maine	New Mexico	Texas
Delaware	Maryland	New York	Utah
Florida	Massachusetts	North Carolina	Virginia
Georgia	Michigan	North Dakota	Washington
Idaho	Minnesota	Ohio	West Virginia
Illinois	Mississippi	Oklahoma	Wisconsin
			Wyoming

(x) Effective April 1, 1968 under authority of Special Permission No. 5258 of the Federal Communications Commission.

Material omitted from this page now shown on 10th Revised Page 84.

PRIVATE LINE SERVICE

3. CHANNELS (Cont'd)

3.2 Classification and Rates (Cont'd)

3.2.5 Series 5000 Channels (Cont'd)

(B) Regulations (Cont'd)

(6) Telephone Company Provided Services and Western Union Telegraph Company
Provided Services in the Same Base Capacity

(N)

When a customer is being furnished base capacity under this Series and only a portion of such capacity is arranged for use, additional channels up to the maximum of the base capacity may, at the option of the customer, be ordered from the Western Union Telegraph Company.

When a customer is being furnished base capacity under the tariff of The Western Union Telegraph Company and only a portion of such capacity is arranged for use, additional channels up to the maximum of the base capacity may, at the option of the customer, be ordered from the Telephone Company.

When a base capacity includes channels furnished by both the Telephone Company and The Western Union Telegraph Company, the base capacity charge for the portion of the channels which carry interstate traffic furnished by the Telephone Company is determined as follows:

- (a) When all channels arranged for use carry interstate traffic, the charge computed in accordance with (C)(1) following is multiplied by the ratio of the number of equivalent voice grade channels furnished by the Telephone Company to the total number of equivalent voice grade channels arranged for use.
- (b) When some of the channels arranged for use carry interstate traffic and some carry only intrastate traffic, the charge for the interstate portion computed in accordance with (B)(5) preceding is multiplied by the ratio of the number of equivalent interstate voice grade channels furnished by the Telephone Company to the total number of equivalent interstate voice grade channels arranged for use.

The charge for each two point section is computed separately.

For all other items associated with the Telephone Company provided services, the rate specified in (C)(2), (3), (4), (5), (6), (7) and (8) following, apply.

(N)

PRIVATE LINE SERVICE

3. CHANNELS (Cont'd)

3.2 Classification and Rates (Cont'd)

3.2.5 Series 5000 Channels (Cont'd)

(C) Rates

(1) Base Capacity

Per Airline Mile
 Per Month

Type 5700
 Type 5800

\$28.00
 60.00

(C)(I)
 (C)(I)

(2) Service Terminals

A service terminal is required for each service arranged for use by the customer, for each connection of such service to a station, or for each connection of such service to a Telephone Company office for the purpose of establishing a channel in connection with Foreign Exchange Service. Where a channel switching arrangement is provided, each station at the switching point requires a service terminal for each of the channels to which it is connected and which can be operated as a separate channel. The charges set forth below apply.

(a) Service Terminals for Use as a Wideband Channel

- (i) For the first station in an exchange or for a connection to a Telephone Company office on each service in use, except that where service terminals of the types specified in (iii) following are furnished at an exchange in connection with a wideband multiway switching arrangement or a wideband select and control arrangement, the charges are as set forth therein:

Each city zone is considered an exchange where the rate mileage measurement as set forth in 3.1.3(C)(1)(b) is applicable.

Per Service Terminal

	Installation Charge	Monthly Charge
Type 5701	\$200.00(C)(I)(R)	\$425.00(C)(I)(v)
- Supplementary control arrangement	100.00	65.00
Type 5703	200.00(C)(R)	425.00(C)(I)(x)
Type 5706	200.00(R)	425.00(R)
Type 5707 (furnished only at 250 Watt UHF transmitting and receiving stations (USOC OXO) specified in 4.2.3 following)	400.00	560.00
Type 5708	100.00	150.00 (N)(v)
Type 5751	200.00(C)(I)(R)	650.00(C)(I)(y)
- Supplementary control arrangement	100.00	65.00 (N)
Type 5753	500.00	945.00 (D)(z)

- (u) Effective April 1, 1968 under authority of Special Permission No. 5258 of the Federal Communications Commission, except that material relative to 50 Kilobit Switched Service now appearing on 8th Revised Page 84 which is reissued on this page to become effective April 1, 1968 under authority of Special Permission No. 5258 of the Federal Communications Commission.
- (v) Expires with March 31, 1971 unless sooner canceled, changed or extended.
- (w) Replaces material relative to Types 5701, 5702 and 5704.
- (x) Replaces material relative to Types 5703 and 5705.
- (y) Replaces material relative to Types 5751 and 5754.
- (z) Material relative to Types 5755 and 5801 is no longer applicable.
- Certain material on this page formerly shown on 1st Revised Page 83.

AM. TEL. & TEL. CO. L. L. DEPT.
Adm. Rates and Tariffs
32 Ave. of the Americas, New York, N.Y. 10013
Issued: March 25, 1968

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TARIFF F.C.C. NO. 260
8th Revised Page 84.1
Cancels 6th Revised Page 84.1
Cancels 7th Revised Page 84.1 (w)
Effective: June 1, 1968

PRIVATE LINE SERVICE

3. CHANNELS (Cont'd)

3.2 Classification and Rates (Cont'd)

3.2.5 Series 5000 Channels (Cont'd)

(C) Rates (Cont'd)

(2) Service Terminals (Cont'd)

(a) Service Terminals for Use as a Wideband Channel (Cont'd)

- (11) For the second or subsequent station in an exchange on any individual service.

Per Service Terminal

	Installation Charge	Monthly Charge	
Type 5701	\$200.00	\$300.00	(C)(I)(x)
Type 5703	200.00 (I)	375.00	(C)(I)(y)
			(D) (z)
			(C)
Charges specified above include either			
- A key control and lamp indicator arrangement at one of the stations within the exchange to transfer the interexchange data or facsimile channel or such channel and the telephone coordinating channel or			
- A bridging arrangement for data or facsimile receiving only capabilities			
Additional charges to equip from two to a maximum of ten service terminals with both the key transfer arrangement and the bridging arrangement described above			
- For the first two stations (including the first station in an exchange)			
	40.00	38.00	
- For each additional station			
	25.00	20.00	
Type 5706	200.00 (I)	300.00 (I)	

- (w) Effective April 1, 1968 under authority of Special Permission No. 5258 of the Federal Communications Commission.
(x) Replaces material relative to Type 5702.
(y) Replaces material relative to Types 5703 and 5705.
(z) No longer applicable.

PRIVATE LINE SERVICE

3. CHANNELS (Cont'd)

3.2 Classification and Rates (Cont'd)

3.2.5 Series 5000 Channels (Cont'd)

(C) Rates (Cont'd)

(C) Service Terminals (Cont'd)

(a) Service Terminals for Use as a Wideband Channel (Cont'd)

(iii) Where interexchange channels are provided for use with service terminals of the following types and such channels are terminated in a wideband multi-way switching arrangement as specified in (4)(c) following or in a wideband select and control arrangement as specified in (4)(c) following, the service terminal charges at the exchange in which such switching arrangement is located are:

	Installation Charge	Monthly Charge
For each termination of interexchange channel		
Type 5701		
Per line terminated (from customer station)	\$100.00(R)	\$150.00(I)(F)
- available only where the channel is arranged for transmission (1) at a rate of 40,800 bits per second, or (2) of non-synchronous signals at a maximum rate of approximately 50,000 bits per second or (3) of synchronous signals at a rate of 50,000 bits per second.		
Per trunk terminated (from another switching arrangement)	150.00	230.00(I)
- available only where the channel is arranged for transmission at a rate of 40,800 bits per second		
Type 5703		
Per line terminated (from customer station)	100.00(R)	150.00(R)
- available only when the channel is arranged for the transmission of sequential synchronous signals at a rate of 19,200 bits per second		
Type 5706		
Per line terminated (from customer station)	100.00(R)	150.00(F)
For each coordinating voice channel terminated at the customers station on a non-switched basis	10.00	12.50
Type 5707		
Per line terminated (from remote radio site)	100.00(R)	150.00(F)
For each voice channel terminated at a customer station on a non-switched basis	10.00	12.50

(iv) A coordinating voice channel terminated at a wideband station may be extended to additional locations within the same building at the following rates:

Each termination	10.00	1.00
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(v) Where a Type 5701, 5703, or 5751 service terminal is changed from one to another of the types of use itemized under the descriptions of those terminals in (A)(2)(a), a charge for substitution equivalent to the installation charge shown under (i), (ii) or (iii) applies.

PRIVATE LINE SERVICE .

3. CHANNELS (Cont'd)

3.2 Classification and Rates (Cont'd)

3.2.5 Series 5000 Channels (Cont'd)

(C) Rates (Cont'd)

(2) Service Terminals (Cont'd)

(b) Service Terminals for Use as Channels of a Lesser Capacity

- (1) For the first station in an exchange or for a connection to a Telephone Company office on each service in use.

Each city zone is considered an exchange when the rate mileage measurement as set forth in 3.1.3(C)(1)(b) is applicable.

Per Service Terminal

Voice

	<u>Installation Charge</u>	<u>Monthly Charge</u>
Type 5201	\$20.00 (I)	\$ 25.00 (I)
Type 5202	20.00	25.00
Type 5203	20.00	25.00
Type 5204	20.00	25.00
Type 5205	20.00	25.00
Type 5206	20.00	25.00
Type 5301	20.00	25.00

Teletypewriter

Type 5101	20.00	25.00
Type 5102	20.00	25.00
Type 5103	20.00	25.00
Type 5104	20.00	25.00
Type 5105	20.00	25.00
Type 5106	20.00	25.00

Telephotograph

Type 5402	20.00	100.00
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Data

Type 5302	20.00	25.00
Type 5401	20.00 (I)	245.00 (I)

PRIVATE LINE SERVICE

3. CHANNELS (Cont'd)

3.2 Classification and Rates (Cont'd)

3.2.5 Series 5000 Channels (Cont'd)

(C) Rates (Cont'd)

(2) Service Terminals (Cont'd)

(b) Service Terminals for Use as Channels of a Lesser Capacity

(1) For the second or subsequent station in an exchange on any individual service.

Per Service Terminal	Installation Charge	Monthly Charge
<u>Voice</u>		
Type 5201	\$20.00 (1)	\$10.00 (1)
Type 5202	20.00	10.00
Type 5203	20.00	10.00
Type 5204	20.00	10.00
Type 5205	20.00	10.00
Type 5206	20.00	10.00
<u>Teletypewriter</u>		
Type 5101	20.00	10.00
Type 5102	20.00	10.00
Type 5103	20.00	10.00
Type 5104	20.00	10.00
Type 5105	20.00	10.00
Type 5106	20.00	10.00
<u>Data</u>		
Type 5401	20.00	10.00
Type 5402	20.00	20.00
<u>Telephotograph</u>		
Type 5402	20.00 (1)	15.00 (1)

(c) Move Charges

When a service terminal is moved to a different building, installation charges apply.

When a service terminal is moved to a new location within the same building, one-half the installation charge applies.

(3) Connecting Arrangements

A connecting arrangement is required for each connection of a channel furnished under this series to:

- An interexchange channel furnished under other series, except where the connection is by means of a switching arrangement.
- An alternate use arrangement, as specified in (b) following, except where a connecting arrangement, for the purpose specified in (a) preceding, or a service terminal is provided.

A connecting arrangement charge equal to the service terminal charge for the first station on such channel or for a connection to a Telephone Company office as specified in (C)(2)(a)(i) or (C)(2)(b)(i) preceding applies for each such connecting arrangement as appropriate.

(1)

(x) Effective April 1, 1968 under authority of Special Permission No. 5258 of the Federal Communications Commission, except that material coded (T) now appearing on 6th Revised Page 86 which is reissued on this page to become effective April 1, 1968 under authority of Special Permission No. 5258 of the Federal Communications Commission.

PRIVATE LINE SERVICE .

3. CHANNELS (Cont'd)

3.2 Classification and Rates (Cont'd)

3.2.5 Series 5000 Channels (Cont'd)

(c) Rates (Cont'd)

(4) Switching and Selecting Arrangements

- (a) Switching arrangements for use with the following types of channels are provided at the same rates as specified for channels furnished under other series:

Voice
Telephotograph
Teletypewriter
Remote Metering, Supervisory Control and Miscellaneous Signaling
Data

(b)

(D)(y)

(D)(y)

(x) Effective April 1, 1968 under authority of Special Permission No. 5258 of the Federal Communications Commission.
(y) No longer applicable.

PRIVATE LINE SERVICE

3. CHANNELS (Cont'd)

3.2 Classification and Rates (Cont'd)

3.2.5 Series 5000 Channels (Cont'd)

(C) Rates (Cont'd)

(4) Switching and Selecting Arrangements (Cont'd)

Installation Charge	Monthly Charge
------------------------	-------------------

- (c) Multivay wideband switching arrangements permit connections to be established between an inter-exchange channel and a station termination provided within the same exchange as the switching arrangement, for originating or terminating transmissions, or to connect interexchange channels and for such connections with inter-exchange channel and station terminations arranged for use with Type 8001 service terminals furnished for similar purposes. The switching arrangement may be ordered only in an exchange where a customer premises is connected to the service, or at an exchange where the switching arrangement is connected to a wideband channel arranged for alternate use as a number of channels of lesser capacity, and one or more of the channels of lesser capacity serves a station within such exchange.

Arrangement with capacity for terminating up to a maximum of ten wideband channels equipped with 5700 type service terminals. Service terminals in connection with inter-exchange channels are furnished as specified in (C)(2)(a)(iii) preceding. Connection of a customer premises in the same exchange as the switching arrangement is furnished at the rate set forth in (C)(2)(a)(ii) preceding.
(Requires the use of an appropriate control channel and control equipment.)

per termination	\$ 15.00	\$ 18.00
-----------------	----------	----------

(D)(y)

(D)(y)

Each city zone is considered an exchange where the rate mileage measurement as set forth in 3.1.3(C)(1)(b) preceding is applicable.

(D)(y)

(D)(y)

(x) Effective April 1, 1968 under authority of Special Permission No. 5258 of the Federal Communications Commission.
(y) No longer applicable.

PRIVATE LINE SERVICE

3. CHANNELS (Cont'd)

3.2 Classification and Rates (Cont'd)

3.2.5 Series 5000 Channels (Cont'd)

(C) Rates (Cont'd)

(5) Alternate Use Arrangements

- (a) Type 1 - for use to permit Base Capacity equivalent to 6 or 12 Voice grade channels to be alternately used with service terminals of Type 57 classification except Type 5708 (N)(y) or as a number of channels of lesser capacity, provided that the alternate use is limited to such a capacity within: (C)
(T)

(i) a two-point section, or

- (ii) multi-point sections where the Base Capacity of which alternate use is desired has neither intermediate service terminals nor intermediate connections to other channels associated with the Base Capacity (or portion thereof) arranged for alternate use. (T)

At each terminal of a section or group of sections arranged for the alternate use of Base Capacity equivalent to 6 or 12 voice channels except at a terminal where a Series 5000 and a Series 8000 are connected solely for the purpose of forming a through channel. (T)
(T)

6 Voice channels
12 Voice channels

Monthly
Charge
\$25.00
25.00

(D)(x)

At each terminal of a section or group of sections so arranged, a service terminal or connecting arrangement for each of the two types of operation is required for each channel arranged for use within the alternately used capacity.

When the operation of an alternate use arrangement is controlled from a different exchange, a low frequency control channel or other appropriate control path is required between the alternate use arrangement and the associated control station.

Rates for low frequency control channels are as provided in this Series or in Series 1000.

- (b) Tone Arrangement - to produce an interrupted tone transmitted from a control station to all stations on voice services associated with a Type 1 alternate use arrangement. Includes automatic operation of the alternate use arrangement at that terminal upon expiration of a timed period.

Per voice service in a single alternately used section

	Installation Charge	Monthly Charge
- first service	\$20.00	\$11.00
- each additional service simultaneously affected	None	1.00

(6) Conditioning

The charges for conditioning individual channels of lesser capacity furnished under this series for (1) voice and data transmission (except Type 5401) are as specified in 3.4 following and (2) for telephotograph transmission are as specified in 3.2.4 (C)(5)(a) preceding. (T)
(T)

- (v) Effective April 1, 1968 under authority of Special Permission No. 5258 of the Federal Communications Commission, except that material relative to 50 Kilobit Switched Service now appearing on 5th Revised Page 88 which is reissued on this page to become effective April 1, 1968 under authority of Special Permission No. 5258 of the Federal Communications Commission.
(x) No longer applicable.
(y) Expires with March 31, 1971 unless sooner canceled, changed or extended.
Material omitted from this page related to station arrangement is replaced by material on 3rd Revised Page 88.1.

PRIVATE LINE SERVICE

3. CHANNELS (Cont'd)

3.2 Classification and Rates (Cont'd)

3.2.5 Series 5000 Channels (2)

(C) Rates (Cont'd)

	Installation Charge	Monthly Charge	
(7) <u>Automatic Calling Unit</u>			(T)
For use with Types 5701, 5703 and 5701 wideband service terminals except those used for terminating a channel having a frequency bandwidth of approximately 10 to 20,000 cycles per second or 200 to 100,000 cycles per second.	(C) (C)	Codes and charges as specified for Automatic Calling Unit, Code 2XU in 4.3.4 following apply.	
(8) <u>Other Items</u>			(T)
Except as otherwise specified in 5. following, the charges applicable for channel arrangements listed below are as set forth in 3.2.1, 3.2.2, 3.2.3, and 3.2.4 preceding and charges applicable for equipment are as set forth in 4. and 7. following for services of the same type and furnished for the same purpose under Series 1000, Series 2000, Series 3000, and Series 4000 Services.			
Neutral Signal Repeater Arrangement			
Polar Operation			
Reversible Operation			
Special Secretarial Operation			
Station Arrangement			
Station Connection			
Teletypewriter Foreign Exchange Connection			(T)

PRIVATE LINE SERVICE

3. CHANNELS (Cont'd)

3.2 Classification and Rates (Cont'd)

3.2.8 Series 8000 Channels (Cont'd)

(A) Types and Descriptions (Cont'd)

(3) Terminating Arrangements (Cont'd)

(a) Service Terminals for Use as a Wideband Channel

Type 8801

Service terminals for any one of the following uses. The channel or channels developed by each service terminal require the full capacity of a Type 8800 interexchange channel.

- to terminate a channel having a frequency bandwidth of approximately 10 to 20,000 cycles per second with only minor deviation in gain and delay characteristics within this frequency range (C)
- to accommodate the transmission of data signals at a rate of 40,800 bits per second in sequence and including one voice channel termination for coordination purposes
- to accommodate the transmission of sequential non-synchronous signals of varying bit lengths at a maximum rate of approximately 50,000 bits per second or synchronous signals at a rate of 50,000 bits per second. Arrangements for terminating a voice channel for coordination purposes are also included. (C)

At the customer's option a supplementary control arrangement will be provided suitable for simultaneously conditioning three signals, one from each of two groups of five possible signals and one from a group of four possible signals, at rates up to 20 such combinations per second for transmission in lieu of, or alternate to, voice use of the coordination channel.

Type 8802

Service terminals for terminating a channel furnished in connection with 50 kilobit switched foreign exchange service in a Telephone Company office. The channels developed by each service terminal require the full capacity of the Type 8800 interexchange channel and accommodate the transmission of sequential non-synchronous signals at a maximum rate of approximately 50,000 bits per second or sequential synchronous signals at a rate of 50,000 bits per second. Arrangements for terminating a voice channel for coordinating purposes are also included.

(N)(y)

(N)(y)

Type 8803

Service terminals for any one of the following uses. The channels developed by each service terminal require the interexchange channel capacity equivalent to six voice channels

- to accommodate the transmission of two-level facsimile signals within the frequency range of approximately 29 to 44 kilocycles per second. Arrangements for terminating a voice channel for coordination purposes are also included.
- to accommodate the transmission of sequential synchronous signals at a rate of 19,200 bits per second. Arrangements for terminating a voice channel for coordination purposes are also included.

(b) Service Terminals for Use as Individual Voice Grade Channels

Voice: Service terminals suitable for terminating channels having transmission characteristics and with terminating arrangements similar to those furnished under Series 2000 and Series 3000 (Type 3001 only) channels. The types of Series 8000 voice service terminals are as follows:

Type 8201
Type 8202
Type 8203
Type 8204
Type 8205
Type 8206
Type 8301

(x) Effective April 1, 1968 under authority of Special Permission No. 5258 of the Federal Communications Commission, except that material relative to 50 Kilobit Switched Service now appearing on 2nd Revised Page 139.2 which is reissued on this page to become effective April 1, 1968 under authority of Special Permission No. 5258 of the Federal Communications Commission.

(y) Expires with March 31, 1971 unless sooner canceled, changed or extended.

PRIVATE LINE SERVICE

3. CHANNELS (Cont'd)

3.2 Classification and Rates (Cont'd)

3.2.8 Series 8000 Channels (Cont'd)

(A) Types and Arrangements

(3) Terminating Arrangements (Cont'd)

(b) Service Terminals for Use as Individual Voice Grade Channels (Cont'd)

Telephotograph: Service terminals suitable for terminating channels having transmission characteristics and with terminating arrangements similar to those for Type 4002 channels for telephotograph transmission furnished under Series 4000 channels. Each channel has the equivalent of one voice grade channel. The types of Series 8000 telephotograph service terminals are as follows:

Type 8402

Data: Service terminals suitable for terminating channels having transmission characteristics and with terminating arrangements similar to those for Type 4002 or Type 4001 channels furnished for data transmission. Each channel has the equivalent of one voice grade channel. The types of Series 8000 data service terminals are as follows:

Type 8302

Type 8401

(c) Terminal Control Arrangements

When individual voice grade channels are provided in accordance with the provision of (B)(1)(a) following, terminal control arrangements will be ordered by the customer at the rates specified in (C)(2)(c) following.

(B) Regulations

(1) General

In addition to the regulations set forth in 2. preceding, the following regulations apply to Series 8000 channels as specified below.

- (a) All channels furnished under this series will be arranged for use by utilizing service terminals provided by the Telephone Company. At the request of the customer, wideband channels, except those furnished with 50 kilobit switched foreign exchange service, will also be arranged for use as individual channels of voice grade. When arranged for use as individual voice grade channels only, or as individual voice grade channels furnished alternately or in addition to wideband channels, terminal control arrangements provided by the Telephone Company are required. (T)(z)
(T)(z)
(N)(y)
(N)(y)
(T)(z)

- (b) Within the limits of the Type 8800 channel capacity, and subject to the provisions of (a) preceding, the customer may order as many individual voice grade channels arranged for use as he requires.

These individual voice grade channels are considered as arranged for use when the necessary service terminals are furnished pursuant to the customer's order.

- (c) Channels are furnished between stations for voice, telephotograph, facsimile, data transmission, remote metering, supervisory control, miscellaneous signaling and other purposes for which service terminals are provided under (3)(b) preceding.

- (d) In an alternate use mode as individual voice grade channels, one of the voice grade channels provided in accordance with (b) preceding, will be associated with the wideband service terminal for coordination purposes and this channel may not be suitable for other purposes. (C)

- (e) Except as otherwise provided below, the regulations applicable are as set forth for services of the same type and furnished for the same purposes under Series 2000, Series 3000 and Series 4000 services.

- (x) Effective April 1, 1968 under authority of Special Permission No. 5258 of the Federal Communications Commission, except that material relative to 50 Kilobit Switched Service now appearing on 4th Revised Page 139.3 which is reissued on this page to become effective April 1, 1968 under authority of Special Permission No. 5258 of the Federal Communications Commission.
(y) 50 Kilobit Switched Service expires with March 31, 1971 unless sooner canceled, changed or extended.
(z) Effective April 1, 1968.

PRIVATE LINE SERVICE

3. CHANNELS (Cont'd)

3.2 Classification and Rates (Cont'd)

3.2.8 Series 8000 Channels (Cont'd)

(C) Rates (Cont'd)

(3) Switching and Selecting Arrangements

- (a) Switching arrangements for use with the following types of channels are provided at the same rates as specified for channels furnished under other series:

Voice
Telephotograph
Remote Metering, Supervisory Control and Miscellaneous Signaling
Data

	<u>Installation Charge</u>	<u>Monthly Charge</u>
--	--------------------------------	---------------------------

- (b) Multiway wideband switching arrangements permit connections to be established between an inter-exchange channel and a station termination provided within the same exchange as the switching arrangement, for originating or terminating transmissions, or to connect interexchange channels and for such connections with interexchange channel and station terminations arranged for use with Type 5701 service terminals. The switching arrangement may be ordered only in an exchange where the service terminates at a customer's premises, or at an exchange where the switching arrangement is connected to a wideband channel arranged for alternate use as a number of individual voice grade channels, and all of these channels serve stations within that exchange.

(C)

Arrangement with capacity for terminating up to a maximum of ten wideband channels equipped with Type 8800 service terminals. Service terminals are furnished as specified in (C)(2)(a)(iii) preceding.

A termination at a customer's premises in the same exchange as the switching arrangement is furnished at the rate set forth in (C)(2)(a)(ii) preceding.
(Requires the use of an appropriate control channel and control equipment.)

per termination	\$ 15.00	\$ 18.00
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Each city zone is considered an exchange where the rate mileage measurement as set forth in 3.1.3(C)(1)(b) preceding is applicable.

(4) Conditioning

Conditioning for individual channels of voice grade furnished under this series for voice and data transmission (except Type 8401) is provided at the charges specified in 3.4 following.

PRIVATE LINE SERVICE

3. CHANNELS (Cont'd)

3.2 Classification and Rates (Cont'd)

3.2.8 Series 8000 Channels (Cont'd)

(C) Rates (Cont'd)

(5) Automatic Calling Unit

For use with Types 8801 and 8803 service terminals except those used for terminating a channel having a frequency bandwidth of approximately 10 to 20,000 cycles per second (C)

<u>Installation</u> <u>Charge</u>	<u>Monthly</u> <u>Charge</u>
--------------------------------------	---------------------------------

Codes and charges as specified for Automatic Calling Unit, Code 2XU in 4.3.4 following apply.

(6) Other Items

Except as otherwise provided in 5. following, the charges applicable for equipment are as set forth in 4. and 7. following for services of the same type and furnished for the same purpose under Series 2000, Series 3000 and Series 4000 services.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH
COMPANY, LONG LINES DEPARTMENT

Revisions of Tariff F.C.C. No. 260
Series 5000 Channels (TELPAK Services)

)
)
) Transmittal No. 10069
)
)

REPLY TO PETITION FOR SUSPENSION

American Telephone and Telegraph Company (AT&T),
pursuant to Section 1.773(c) of the Commission's Rules,
hereby replies to the "Petition for Suspension, Investigation
and Hearing on Telpak Tariff Increases" of Air Transport
Association of America (ATA), dated March 25, 1968, insofar
as that Petition requests suspension of the rates filed
March 25, 1968, to become effective June 1, 1968, as follows:

1. It is respectfully submitted that the request
for suspension should be denied. The rates in question are
interim in nature, having been filed in lieu of the higher
rates which had been filed on February 1, 1968 (Transmittal
No. 10001). The cost and market information submitted to
the Commission in connection with the rates filed February 1
fully demonstrates that rates higher than the instant rates
would be justified. In view of the evidence already fur-
nished to the Commission, it is submitted that there should
be no question as to the lawfulness of the instant rates.

2. The Commission has previously made clear its intention to institute a proceeding for investigation and hearing in connection with the filing of increased TELPAK rates (e.g., Memorandum Opinion and Order adopted January 23, 1968 (FCC 68M-130), para. 7). As indicated in our application for special permission to file the instant rates (Application No. 643 dated March 13, 1968), we believe that in any such proceeding it will be demonstrated that TELPAK rates should be established at substantially the level of those filed February 1, 1968.

3. No reply is being made at this time (i.e., within the time limit specified in Section 1.773(c) of the Rules) to the remaining portions of the ATA petition.

Respectfully submitted,

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

By F. Mark Garlinghouse
F. Mark Garlinghouse

By Ernest D. North
Ernest D. North

By Harold J. Cohen
Harold J. Cohen

Its Attorneys

195 Broadway
New York, New York 10007

March 28, 1968

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH
COMPANY

Revisions of Tariff F.C.C. No. 260,
Series 5000 Channels (TELPAK Services)

)
)
) Transmittal No. 10069
)
)

OPPOSITION

(To be acted upon by the Commission)

American Telephone and Telegraph Company (AT&T)
hereby opposes the "Further Petition for Temporary Relief"
dated March 27, 1968, filed by Aerospace Industries Associa-
tion of America, Inc. (AIA) and in support of such opposition
respectfully states as follows:

1. AIA's petition requests a Commission order stay-
ing the effectiveness of the revised TELPAK rates and regula-
tions filed with AT&T Transmittal No. 10069 pending the
issuance of a final order by the Commission in Docket No.
17457. In substance, the petition seeks Commission action
to defer the effective date of such revised TELPAK rates
beyond the statutory period of suspension provided in § 204
of the Communications Act. This is a renewal of the request
embodied in AIA's earlier "Petition for Temporary Relief"
dated February 21, 1968, which was directed at the tariff
revisions filed with AT&T Transmittal No. 10001. The alle-
gations of the latter document have been incorporated by
reference in AIA's current pleading.

2. AIA's arguments in support of its petition have already been fully answered in AT&T's Oppositions dated February 9 and March 6, 1968, in Transmittal No. 10001. Accordingly the points made in those Oppositions are incorporated herein by reference. As shown there, apart from the lack of any statutory or other legal authority in the Commission to grant the type of relief requested, AIA has failed to establish any justification for such relief. In the instant case this lack of justification is even more apparent, since the rate revisions in question are interim in nature and are at a significantly lower level than those rate revisions which were filed with AT&T Transmittal No. 10001, the reasonableness of which has been fully demonstrated by data furnished to the Commission.

WHEREFORE, AIA's petition should be denied.

Respectfully submitted,

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

By /s/ Ernest D. North

Ernest D. North

By /s/ Harold J. Cohen

Harold J. Cohen

By /s/ C. Duane Aldrich

C. Duane Aldrich

195 Broadway
New York, New York 10007

Its Attorneys

April 5, 1968

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
LONG LINES DEPARTMENT

Transmittal No. 10069

Revisions of Tariff F.C.C. No. 260,
Series 5000 Channels (TELPAK Services)

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
and the Associated Bell System Companies

Docket No. 16258

Charges for Interstate and Foreign
Communication Service

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

Docket No. 15011

Charges, Practices, Classifications, and
Regulations for and in Connection with
Teletypewriter Exchange Service

In the Matter of

TELPAK Tariff Sharing Provisions of
American Telephone and Telegraph Company
and The Western Union Telegraph Company

Docket No. 17457

RESPONSE TO PETITION FOR CONSOLIDATION
(To be acted on by the Commission)

The Bell System Respondents hereby respectfully
submit their comments on the "Petition for Suspension,
Investigation, and Hearing on Telpak Tariff Increases, and
for Consolidation with Current Hearings on Telpak Sharing
Provisions and Compensatory Nature of Present Telpak Rates"

(Petition), dated March 25, 1968, filed by Air Transport Association of America (ATA), insofar as that Petition requests that there be a consolidation in one proceeding of any hearing involving the lawfulness of the TELPAK rate revisions filed with AT&T Transmittal No. 10069 and the hearings on related issues in other proceedings now before the Commission.

1. ATA's Petition requests that the Commission suspend the revisions of TELPAK rates and regulations filed with AT&T Transmittal No. 10069 and institute a proceeding to investigate the lawfulness thereof, and further requests that the Commission consolidate in one proceeding the hearing on the issues with respect to these revised rates, on the issues in Docket No. 17457 (TELPAK Sharing Regulations) and on the Phase I-B issues in Docket No. 16258 (the general interstate rate investigation). ATA suggests that it is of no concern to it whether such a consolidation is effected through the vehicle of an existing proceeding or by the institution of a new proceeding.

2. AT&T has already filed, pursuant to § 1.773(c) of the Commission's Rules and Regulations, its reply to that part of the Petition which requests suspension of the tariff revisions in question ("Reply to Petition for Suspension," dated March 28, 1968). As noted in that reply, the Commission has previously made clear its intention to institute a pro-

ceeding for investigation and hearing in connection with the filing of revised TELPAK rates. Consequently, the following comments are directed to those portions of ATA's Petition which request the consolidation of TELPAK and related issues in one proceeding and which purport to define the issues which would confront the Commission in a consolidated proceeding.

3. In support of its request for consolidation ATA argues that the Telephone Committee's Memorandum Opinion and Order released January 23, 1968 in Docket No. 16258 (FCC68M-130) "has destroyed the premise . . . that Docket No. 16258 is concerned only with total revenue requirements and with variations in the levels of earnings for the different classes of service, and not with the internal rate components, practices or regulations within each of the principal rate classifications of service." (Petition, para. 20.) Hence, ATA further argues, all proceedings, present and proposed, involving the TELPAK tariff should be merged into a single proceeding, since ". . . the TELPAK sharing issues are now clearly so inseparably and inextricably involved with the TELPAK level of rate issues . . . that it would be meaningless and wasteful to try to determine either set of issues in a vacuum and without concurrent hearing and determination of the other set of issues." (Petition, para. 21.) For the reasons set out below the

Bell System Respondents agree that a consolidation of the issues in any proceeding involving the lawfulness of its TELPAK rate revisions and of those in Docket No. 17457 would be appropriate, but they are opposed to any consolidation which would import into Docket No. 16258 issues involving the propriety of specific rates or rate regulations.

4. It must be agreed that the issues in the TELPAK sharing docket and those which would arise in any docket relating to the level of TELPAK rates or the propriety of specific TELPAK rates are interrelated, and that separate hearings for the trial of such issues will involve the burden of substantial and possibly prejudicial duplications of effort in the preparation and presentation of testimony and exhibits and in the cross-examination of witnesses. Hence, a consolidation into one proceeding of all issues involved in Docket No. 17457 and in the proposed proceeding relating to the TELPAK rate revisions filed March 25, 1968 would clearly be appropriate to minimize such burden, and might ultimately contribute to a speedier resolution of the issues.

5. However, there is no justification or need for the hearing of issues relating to specific TELPAK rates in Docket No. 16258. Contrary to ATA's contention, the Telephone Committee's Memorandum Opinion and Order released

January 23, 1968 was not intended to change in any way the scope of the issues in Docket No. 16258 as previously defined by the Commission. This was confirmed by the Hearing Examiner and by Counsel for the Commission, whose statement on this point had been read and concurred in by the Telephone Committee. (Docket No. 16258, Tr. 15063-72, 15251-52.)

6. The remaining issues in Phase 1 of Docket No. 16258 have been defined by the Staff (with Telephone Committee concurrence) as follows:

"1. What principles and factors should govern a determination of the revenue contributions to be made by each class of service in the overall revenue requirements of Respondents?

"2. What interim adjustments, if any, should be made in the overall level of rates for each class of service to give effect to those principles?"
(Docket No. 16258, Tr. 15251.)

The cost and marketing evidence thus far presented by Respondents in Docket No. 16258 has illustrated the methods and results of applying the ratemaking principles and factors which they believe to be appropriate. Such evidence has not been presented for the purpose of supporting particular rates, and it is Respondents' position that no determinations with respect to particular rates are required in Docket No. 16258 in order for the Commission to make appropriate findings on the first issue defined above.

7. ATA's insistence on the need to effect a consolidation involving Docket No. 16258 is evidently related to its repeated assertion that the Commission must determine the question whether existing TELPAK C and D rates are compensatory - a question originally at issue in Docket No. 14251 and transferred to Docket No. 16258 by the Commission's Memorandum Opinion and Order in those dockets released November 10, 1966 (7 F.C.C.2d 30). But the filing of TELPAK rate revisions has, in effect, mooted that issue, and no determination of that issue is necessary or significant to a determination of the lawfulness of the proposed TELPAK rate revisions. A determination that the presently effective TELPAK rates are compensatory would indicate merely that they are not below a cost floor, and would not show that a different or higher level of rates would be unreasonable. A determination, on the other hand, that the presently effective TELPAK rates are not compensatory would show that changes in the rate level are called for. The revised rates which are the subject of ATA's petition are now before the Commission. Certainly there is no support in the Communications Act or in the Commission's orders for the proposition that AT&T's right to file increased TELPAK rates is dependent on proof or a determination that existing rates are noncompensatory.

8. The Staff has acknowledged that with respect to issue 2, as defined above (para. 5), the questions whether the Commission should consider the ordering of interim rate adjustments in Docket No. 16258, and if so, whether additional evidence should be adduced for the record in that proceeding, are still open. (Docket No. 16258, Tr. 15253, 15259-60.) Respondents agree that, as to TELPAK services, these questions could very appropriately be resolved by consolidating all issues relating to rate level, rate structure and sharing in one proceeding separate from Docket No. 16258. But the resolution, in the latter docket, of the basic issues of ratemaking principles and factors should not be complicated by including in that docket issues relating to specific rates and regulations. The Telephone Committee and the full Commission have several times affirmed their conclusion that such a course would be unwise and productive of unnecessary delay. No sound reason exists for disturbing that determination.

Respectfully submitted,

BELL SYSTEM RESPONDENTS

By /s/ Ernest D. North
Ernest D. North

By /s/ Harold J. Cohen
Harold J. Cohen

By /s/ C. Duane Aldrich
C. Duane Aldrich

Their Attorneys

195 Broadway
New York, New York 10007

April 9, 1968

170
Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
LONG LINES DEPARTMENT

Revisions of Tariff F.C.C. No. 260, Private
Line Services, Series 5000 (TELPAK)

DOCKET NO. 18128

O R D E R

Adopted April 10, 1968; Released April 12, 1968

By the Commission: Commissioners Cox and Johnson concurring in the result;
Commissioner Loevinger absent.

1. The Commission has before it revised tariff schedules filed by American Telephone and Telegraph Company on March 25, 1968, under its Transmittal No. 10069, which would effectuate substantial increases in TELPAK rates ^{1/}. For its justification of such substantial increases, A.T.&T. relies specifically on the material which has been received in the record in Docket No. 16258, where the question of the proper overall level of earnings for TELPAK and, concomitantly, whether the present level of rates is compensatory, are at issue.

2. A brief review of the history of the TELPAK rates would appear to be pertinent. These rates were filed in 1961, principally to meet the threat of competition from private microwave systems which had arisen as the result of the Commission's decision in the Above 890 Mc case ^{2/}. TELPAK rates were originally offered in four classifications, A, B, C and D, based on the number of channels required between a given pair of points. After extensive hearings, the Commission found the A and B classifications, which encompassed the lesser number of channels, to be unlawfully discriminatory since they applied to a service similar to the regular private line service but afforded different rates for such service. The justification of competitive necessity was found not to be applicable to the A and B classifications, since it would not be practical for a customer to construct his own microwave

^{1/} We have also considered (a) the "Petition for Suspension, Investigation and Hearing on Telpak Tariff Increases" of Air Transport Association of America, dated March 25, 1968, (b) a "Further Petition for Temporary Relief" filed by Aerospace Industries Association of America, Inc. on March 27, 1968, (c) "Petition of the Secretary of Defense for Suspension and Investigation and for an Accounting Order filed April 2, 1968, (d) "Petition for Suspension, Investigation and Other Relief" filed by Aeronautical Radio, Inc. on April 5, 1968, insofar as they request the suspension action we are taking herein, (e) A.T.&T.'s opposition to the ATA requested suspension, dated March 28, 1968, and (f) Western Union's Reply filed April 9, 1968.

^{2/} Docket No. 11866, 27 F.C.C. 359; rehearing substantially den. 29 F.C.C. 825.

system if his need was limited to the number of channels encompassed by these classifications. The Commission found, however, that there was apparent competitive necessity for the C and D classifications which encompassed larger capacities, but required a further showing on the question of whether the existing rates for such classifications were compensatory ^{3/}. In accordance with our decision in the original TELPAK case, TELPAK A and B were cancelled. Upon such cancellation, the proceeding was terminated and the question as to whether TELPAK C and D were compensatory was placed at issue in Docket No. 16256.

3. The Commission is cognizant of the fact that the record in Docket No. 16256 is not complete as regards TELPAK C and D, since A.T.&T.'s evidence has not yet been fully examined, and the users of service under the TELPAK tariff, a number of whom are parties intervenor to the proceeding, have not as yet had the opportunity to put on their cases in opposition. Presumably, such intervenors will seek to establish that the present rates are in fact compensatory, and that competitive necessity requires their maintenance at the present level. Moreover, we are cognizant of our conclusion in the original TELPAK case that the TELPAK C and D rates were apparently justified by competitive necessity, provided, however, that they be shown to be compensatory.

4. On the basis of the foregoing, and the information now before us, we are unable to determine that the charges, classifications, regulations and practices contained in the revised schedules are or will be just and reasonable or otherwise lawful. If the revised schedules are permitted to become effective on the date specified, the rights and interests of the public may be adversely affected thereby.

5. Although the revised rates are filed to become effective on June 1, 1968, we are taking action to suspend them at this early date in order to afford all interested parties the earliest practicable notice thereof and so that TELPAK users may be able to adjust to the new effective date of these tariff schedules.

6. There are also on file certain pleadings relating to procedures to be followed in investigating the lawfulness of the revised schedules. Action on these matters will be deferred until after opportunity for responsive pleadings has been afforded.

7. There is also under consideration the question as to whether we should impose an accounting order herein and in so the nature thereof.

^{3/} Tentative Decision 35 F.O.C. 370 at 395; affirmed 37 F.O.C. 1111; *aff'd.* sub nom. *American Trucking Assn., Inc. v. F.O.C.*, 377 F.2d 121 (D. C. Cir., 1966); *cert. den.* 30 U. S. 973.

The Commission will consider any timely pleadings addressed to this question before taking further action with respect thereto.

8. We are suspending the proposed tariff schedules to the full extent of our statutory authority on the basis of the considerations recited above. This means that the schedules will become effective September 1, 1968. Moreover, it should clearly be understood by the TELPAK users, that, in the event a complete hearing record indicates that increases in the level of TELPAK rates are justified or required, or that the TELPAK classification should be eliminated, any increases occasioned thereby will become effective without delay. The users should henceforth govern themselves accordingly, and their communications budgets should be prepared with this contingency in mind. In this connection, users have been on notice since 1961 that TELPAK rates presented substantial questions of lawfulness requiring formal investigation and that significant increases in these rates could result.

Accordingly, IT IS ORDERED, That, pursuant to section 204 of the Communications Act of 1934, as amended, a hearing IS INSTITUTED into the lawfulness of the tariff schedules described in the Appendix hereto and the operation of such tariff schedules IS HEREBY SUSPENDED, unless otherwise ordered by the Commission, until September 1, 1968, and that during said period of suspension no changes shall be made in said tariff schedules or in the charges sought to be altered thereby, unless authorized by special permission of the Commission.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple

Ben F. Waple
Secretary

ATTACHMENT

APPENDIX

TELPAC Rates and Regulations

1. This suspension order pertains to that material contained in the revised pages of American Telephone and Telegraph Company's Tariff F.C.C. No. 260, Private Line Service, which were filed on March 25, 1968 by Transmittal No. 10069, dated March 25, 1968. Material suspended includes only that which is designated by the symbols shown in the following list of pages, and, in any event, does not include such material as is specifically exempted in 2, below.

Suspended Material

Page	Symbol
9th Revised 41	(T)
6th Revised 80	(C)(x), (C)(y)
5th Revised 80.1	(T), (C)(x), (N), (D)(y)
4th Revised 81	(C), (D)(y)
5th Revised 82	(C)
4th Revised 83	(C), (T)
1st Revised 83.1	(N)
10th Revised 84	(C)(I), (C)(I)(R), (C)(I)(w), (C)(R), (C)(I)(x), (R), (C)(I)(y), (N), (D)(z) (C)(I)(x), (C)(I)(y), (I), (D)(z), (C)
8th Revised 84.1	(C)(x), (C)(y), (N)
3rd Revised 84.2	(I)
5th Revised 85	(I)
7th Revised 86	(I)
4th Revised 87	(D)(y)
5th Revised 87.1	(D)(y)
6th Revised 88	(C), (D)(x), (T) (Does not include (T) beside paragraph 3.2.5 (C)(5)(a))
3rd Revised 88.1	(T), (C)
3rd Revised 139.2	(C)
5th Revised 139.3	(C)
4th Revised 139.9	(C)
3rd Revised 139.10	(C)

2. Nothing in this order shall be construed to suspend the effective date of any material which pertains to:

a. The cancellation of the increased rates and revised regulations which were filed with Transmittal No. 10001, dated February 1, 1968 to become effective April 1, 1968.

b. The institution of the 50 kilobit switched message service as set forth on revised pages which were filed by Transmittal 10029, dated February 15, 1968 to become effective April 1, 1968.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 68X-606

15459

In the Matter of)

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,)
LONG LINES DEPARTMENT)

DOCKET NO. 18128

Revisions of Tariff F.C.C. No. 260, Private)
Line Services, Series 5000 (TELPAK))

O R D E R

Issued April 16, 1968; Released April 16, 1968

IT IS ORDERED that H. Gifford Irion shall serve as Presiding Officer in the above-entitled proceeding; that the hearings therein shall be convened on May 20, 1968, at 10:00 a.m.; and that a prehearing conference shall be held on April 30, 1968, commencing at 9:00 a.m.; and, IT IS FURTHER ORDERED, that all proceedings shall take place in the Offices of the Commission, Washington, D. C.

FEDERAL COMMUNICATIONS COMMISSION

James D. Cunningham
Chief Hearing Examiner

Ben F. Waple
Ben F. Waple
Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 68M-635
15705

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
LONG LINES DEPARTMENT

Revisions of Tariff F.C.C. No. 260, Private
Line Services, Series 5000 (TELPAC)

DOCKET NO. 18128

O R D E R

Issued April 22, 1968; Released: April 22, 1968

IT IS ORDERED, on the Chief Hearing Examiner's own motion, that the order released April 16, 1968 in the above-entitled proceeding (FCC 68M-606), is amended to provide that the hearing conference and hearing therein shall be convened on dates to be later specified, in lieu of April 30 and May 20, 1968, respectively.

FEDERAL COMMUNICATIONS COMMISSION
James D. Cunningham
Chief Hearing Examiner

[Signature]
S. F. Waple
Secretary

33 Fed. Reg. 10368
July 19, 1968Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554FCC 68-711
18361

In the Matter of)	
)	
AMERICAN TELEPHONE AND TELEGRAPH COMPANY)	
and the Associated Bell System Companies)	
)	DOCKET NO. 16258
Charges for Interstate and Foreign Communi-)	
cation Service)	
)	33 F.R. 10368
In the Matter of)	July 19, 1968
)	
AMERICAN TELEPHONE AND TELEGRAPH COMPANY)	
)	
Charges, Practices, Classifications, and)	
Regulations for and in Connection with)	
Teletypewriter Exchange Service)	
)	DOCKET NO. 15011
In the Matter of)	
)	
AMERICAN TELEPHONE AND TELEGRAPH COMPANY)	
Long Lines Department)	
)	
Revisions of Tariff F.C.C. No. 260, Private)	DOCKET NO. 18128
Line Services Series, 5000 (TELPAX))	

MEMORANDUM OPINION AND ORDER

Adopted July 10, 1968 ; Released July 16, 1968

By the Commission: Commissioner Cox concurring in the result.

1. The Commission has under consideration the revised tariff schedules filed by American Telephone and Telegraph Company and the associated Bell System companies on March 25, 1968, under its Transmittal No. 10069 increasing TELPAK charges, and the order issued April 12, 1968 (FCC 68-338) in Docket No. 18128 suspending the effectiveness of such revised schedules and instituting an investigation into their lawfulness. It also has under consideration a petition filed March 25, 1968, by Air Transport Association (ATA) and certain other parties wherein consolidation of the proceedings in Docket Nos. 16258 and 18128 ^{1/} is requested. Our Order of April 12, 1968, specifically deferred consideration of the requested consolidation. Respondents oppose such a consolidation in Docket No. 16258 but express no objection to consideration of TELPAK rate levels, rate structure and sharing

^{1/} We have under consideration the following pleadings pertinent to the action taken herein:

- (a) "Petition for Suspension, Investigation and Hearing on TELPAK Tariff Increases, and for Consolidation with Current Hearings on TELPAK Sharing Provisions and Compensatory Nature of present TELPAK Rates," filed by Air Transport Association of America on March 25, 1968, in Docket Nos. 16258, 15011 and 17457.

1/ (Continued from page 1)

- (b) "Petition of The Secretary of Defense for Suspension and Investigation, and for an Accounting Order," filed by Department of Defense on April 2, 1968.
- (c) "Petition for Suspension, Investigation, and other Relief," filed by Aeronautical Radio, Inc. on April 5, 1968.
- (d) "Reply to Petition for Suspension," filed by American Telephone and Telegraph Company on March 28, 1968.
- (e) "Statement in Support of Petition for Consolidation of Current Hearings on TELPAK Sharing Provisions and Compensatory Nature of Present TELPAK Rates," filed by Eastern Airlines, Inc. on April 9, 1968.
- (f) "Response to Petition for Consolidation," filed by American Telephone and Telegraph Company on April 10, 1968.
- (g) "Reply to Petitions for Suspension, Investigation, and Hearing of TELPAK Tariff Increases and for Consolidation with Current Hearings on TELPAK Sharing Provisions," filed by The Western Union Telegraph Company on April 10, 1968.

provisions in one proceeding but separate from No. 16258. Aeronautical Radio, Inc. (ARINC) and Eastern Air Lines, Inc., support the request of A.T.A. for consolidation. The Western Union Telegraph Company requests that the Commission proceed with dispatch in the determination of Phase 1-B of Docket No. 16258 that it order the balance of the TELPAK revisions filed at that time; and that it then institute such other proceedings as may be necessary to consider the TELPAK rates. Certain of the petitions under consideration have requested suspension of the revised TELPAK tariff schedules, and to that extent they have been granted by our Order of April 12, 1968, in Docket No. 18123 (FCC 68-382). However, that order left open the question of an accounting order.

2. Docket No. 16258, which we shall refer to as the General Investigation, braces Respondents' total interstate and foreign services pursuant to our Order of October 27, 1965 (2 F.C.C. 2d 871, 30 F.R. 13835). For administrative convenience, we specified a two-phase proceeding in that docket (Order adopted December 22, 1965, 2 F.C.C. 2d 142). We described the scope of the first phase as follows:

Accordingly, in Phase 1 of this proceeding, the Commission will consider Respondents' total revenue requirements applicable to their interstate and foreign communication services, and the relevant rate-making principles and factors that shall control in the distribution of such revenue requirements among Respondents' principal rate classifications. It is desirable that such structural adjustments as may be necessary be achieved on an interim basis within the framework of as sound and reasonable a base of total revenue requirements as it is possible to determine pending resolution of all the issues raised by this proceeding

It was also therein ordered that upon completion of Phase 1, i.e., the completion of the presently scheduled hearings, the Commission would give consideration to what, if any, interim rate adjustments should be ordered on the basis of the record as then developed. Also, in our Memorandum Opinion and Order adopted December 22, 1965 (2 F.C.C. 2d 142), we stated as follows:

In connection with Respondents' presentations as to the appropriate rate-making principles and factors which should govern the proper relationships among the rate levels for each of their principal services, Respondents shall take into consideration the wide variations in level of earnings revealed by the aforementioned seven-way cost study. Respondents shall indicate the specific rate adjustments, if any, which they consider should be made on an interim basis in the light of such study results and the rate-making principles and factors advocated by them.

By our Interim Decision and Order of July 5, 1967, we disposed of portions of the Phase 1 issues concerning Respondents' total revenue requirements. We are currently considering the issue of "rate-making principles and factors," and this has frequently been referred to as Phase 1-B.

3. In the course of the hearings, Respondents have filed the following revised tariff schedules providing for substantial increases in their rates.

<u>Transmittal No.</u>	<u>Subject</u>	<u>Original Effective Date</u>
January 9, 1967 9467	Private Line Telephone and Telegraph, including teletypewriter equipment	May 1, 1967
February 1, 1968 10001	TELPAX	April 1, 1968
February 1, 1968 10002	Audio and Video	April 1, 1968
March 25, 1968 10069	TELPAX	June 1, 1968

The effective date of the increase in teletypewriter equipment rates and the audio and video program transmission rates have been postponed by Respondents to August 1, 1968, and April 1, 1969, respectively. The TELPAK rate filing of February 1, 1968, has been withdrawn and superseded by a lesser increase proposed to be effective June 1, 1968, which has been suspended until September 1, 1968, by our Order instituting Docket No. 18128. We shall refer to all of these as "proposed" rates even though they are not all included in filed tariffs.

4. Respondents take the position that their proposed tariff rates are supported by cost and marketing studies, the results of which they have presented in Phase 1-B of Docket No. 16258. With respect to TELPAK, Respondents also contend that their studies support the increased rates filed on February 1, 1968, but subsequently withdrawn when they substituted what they characterize as "intermediate step" rates.

5. In view of the pleadings before us, we have re-examined the scope and objectives of Phase 1-B with due regard for developments which have occurred since the inception of these proceedings, including the revised rates filed or proposed by Respondents; the nature of the evidence that Respondents have thus far submitted in response to the Phase 1-B issues; and the pendency of related proceedings such as Docket No. 17457 (TELPAX Sharing) and Docket No. 18128 (TELPAX rates).

6. As we have previously indicated from time to time, the issues involved in Phase 1-B are intended and have been designed to establish a basis for the formulation of principles which should govern the establishment and maintenance of over-all rate levels for each of Respondents' interstate services. Stated differently, we seek to determine in Phase 1-B the broad revenue objectives that are to be met by the rates for a given classification of service in terms of its contribution to the total interstate revenue requirements of

Respondents. The consolidations urged by Petitioners would, in our opinion, defeat these objectives by encumbering Docket No. 16258 with the separable and time-consuming task of examining and passing upon the propriety of the internal design or detailed components of the rate structure of a particular class of service.

7. Respondents, in response to the issues in Phase 1-B, have provided evidence with respect to the economic and other considerations relative to the pricing policies they believe should govern the formulation of rate levels for their several classes of services. They have also provided data relative to the costs of providing their principal services. Such cost data have been derived on alternative bases reflecting different approaches to a determination of the relevant costs for each of the services. In addition, Respondents have provided data relative to marketing conditions and the pricing policies indicated thereby for certain of their services and as noted above, Respondents have filed increased rates which they contend are justified by their showing. The other parties in this proceeding, however, have not yet presented their evidence with respect to these matters. It is our expectation that upon completion of the record in Phase 1-B in these respects, the Commission will be in a position to prescribe appropriate principles or guidelines for the determination of the over-all revenue objectives that are to be met by Respondents in the design of each of their principal rate classifications. It is also our intention to determine the extent to which each of the existing or proposed rate classifications accord with, or fall short of, meeting those principles and guidelines, and, if the latter, the nature of the corrective action that should be taken. Again, we stress that we deem it neither necessary nor practical, in the interest of a timely and effective resolution of the issues in Phase 1-B, to treat or to prescribe the internal design or components of each rate classification, but shall limit our consideration to the over-all design or rate levels of such classification in terms of the reasonable revenue contribution that it is to make to the total interstate revenue requirements of Respondents. 2/

8. Thus, with respect to Respondents' rates for TELPAK service, including those now under suspension and investigation in Docket No. 10123, we will determine in Phase 1-B of Docket No. 16258 whether competitive or other valid considerations justify the pricing discrimination existing in the TELPAK offering; and, if so, whether Respondents' existing or proposed rates for TELPAK will make an appropriate contribution to Respondents' total interstate revenue requirements. 3/ These determinations with respect to the revenue objectives appropriate to TELPAK and other services are, in our opinion, of threshold essentiality to a determination of the reasonableness and lawfulness of the specific rates and rate relationships within the individual rate structures. It is also our opinion that we can arrive at these threshold determinations without simultaneously resolving all other questions.

2/ For example, while we shall consider the revenue effect of rate or structural changes proposed by Respondents, such as the change in the telegraph channel equivalency ratio of the TELPAK tariff, we will not determine or prescribe on this record the proper ratio that should be employed or prescribe individual rate components.

3/ This will also include consideration of the effects of the rates on competition within the common carrier industry.

9. We recognize that the resolution of the issues in Docket No. 17457 regarding TELPAK sharing may have an effect upon the market for TELPAK services on the basis of which Respondents have calculated their costs of furnishing such services, which costs have been presented by Respondents in Docket No. 16253 in purported justification of their proposed revised TELPAK rates. This, in turn, could have a substantial impact on the over-all level and revenue yield of TELPAK rates as well as the propriety of the internal rate components of the TELPAK schedule. As we noted in our Order in Docket No. 17457 (FCC 63-389) concerning TELPAK sharing, we expect the presiding officer to employ all reasonable means to expedite that proceeding, and also expect the Chief, Common Carrier Bureau to issue a recommended decision at the earliest possible date. Thus, the proceedings in Docket No. 17457 and those in Docket No. 16253 will be going forward in parallel. We will, therefore, defer hearings in Docket No. 18128 concerning the internal specifics of the TELPAK rate structure until the rate principles determinations are made in Docket No. 16258 and the sharing issue is decided in Docket No. 17457.

10. Because TELPAK service is, in essence, a rate classification within the family of private line services offered by Respondents, appropriate consideration of the reasonableness of TELPAK rates requires simultaneous and coordinate consideration of Respondents' private line tariffs. Accordingly, our Order herein will specify the issues in Docket No. 18128 to embrace all of the private line tariffs, except audio and video program transmission services, but including the charges for teletypewriter station equipment. In this connection we note that these substantial increases in charges for such teletypewriter equipment are now filed to become effective August 1, 1963. We are unable to determine whether such increased charges are or will be just and reasonable, or otherwise lawful; and, if such increased charges are permitted to become effective on the date specified, the rights and interests of the public may be adversely affected thereby. Accordingly, we will suspend their operation for the statutory period 4/. Insofar as Docket No. 16253 is concerned, of course, the revenue contribution of all interstate and foreign services are in issue.

11. In view of our temporary deferral of hearings in Docket No. 18128, it is increasingly important that the proper rate-making principles and factors be determined in Docket No. 16253 as expeditiously as possible. While we are confident the proceeding has progressed with commendable speed, we are nevertheless directing the Hearing Examiner to take all feasible measures to achieve the earliest closing of the evidentiary record on this particular issue. We also expect that in presenting evidence in Docket No. 16258, the parties will be guided by this Memorandum Opinion and Order and that, accordingly, their presentation will be limited to the issue of the appropriate guidelines and principles which should govern the over-all contribution that individual services are to make to the total interstate revenue requirements of Respondents.

4/ Several parties have filed petitions requesting suspension of these charges to which AT&T has not yet responded. Accordingly, we have not considered such petitions but have acted on our own motion.

12. In our previous Order issued April 12, 1968, suspending the proposed TELPAK tariff schedules, we reserved for future determination the question as to whether we should impose an accounting order herein. We have reconsidered this matter, on our own motion, and are of the opinion that the public interest requires that such an accounting order be entered.

Accordingly, IT IS ORDERED, That pursuant to Sections 201, 202, 204, 205 and 403 of the Communications Act of 1934, as amended, the Commission shall enter upon a hearing and investigation in Docket No. 18128 concerning the lawfulness of the private line tariff schedules listed in the Appendix hereto, as well as those which were the subject of our Order released April 12, 1968 (FCC 68-268), and any amendments, cancellations, or successive issues thereof effected during the pendency of the investigation; and

IT IS FURTHER ORDERED, That pursuant to Section 204 of the Communications Act of 1934, as amended, the operation of the tariff schedules listed in the Appendix as becoming effective August 1, 1968, IS HEREBY SUSPENDED, unless otherwise ordered by the Commission, until November 1, 1968, and that during said period of suspension no changes shall be made in said tariff schedules or in the charges sought to be altered thereby unless authorized by special permission of the Commission; and

IT IS FURTHER ORDERED, That without in any way limiting the scope of the investigation of both groups of the aforementioned tariff schedules, it shall include consideration of the following matters:

- (1) Whether any such tariff schedules will subject any person or class of persons to unjust or unreasonable discrimination or give any undue or unreasonable preference or advantage to any person, class of persons, or locality, or subject any person, class of persons, or locality to any undue or unreasonable prejudice, or disadvantage within the meaning of Section 202(a) of the Communications Act of 1934, as amended; and
- (2) Whether any of the charges, classifications, regulations, or practices contained in such tariff schedules are or will be unjust and unreasonable within the meaning of Section 201(b) of the Communications Act of 1934, as amended, and
- (3) Whether the Commission should prescribe just and reasonable charges, classifications, regulations, and practices or the maximum or minimum or maximum and minimum charges to be hereafter followed with respect to the services governed by the subject tariff schedules and, if so, what charges, classifications, regulations, and practices should be prescribed.

IT IS FURTHER ORDERED, That, in the event a decision as to the lawfulness of all the provisions suspended has not been made during the suspension period, and said increased charges, practices, classifications, and regulations go into effect, the American Telephone and Telegraph Company (AT&T) and its connecting and concurring carriers shall, until further ordered by the Commission, keep accurate account of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision therein the Commission may by further Order require the refund thereof, with interest, pursuant to Section 205 of the Communications Act of 1934, as amended, and the carrier shall file with the Commission a report on or before the 10th day of each calendar month, commencing December 10, 1968, showing the amounts accounted for as aforesaid during the previous calendar month; and

IT IS FURTHER ORDERED, That a copy of this Order be filed in the offices of the Commission with said tariff schedules herein suspended; that AT&T and all carriers listed in its Tariff F.C.C. No. 260 as concurring carriers with respect to matters contained in the tariff schedules suspended are hereby MADE PARTIES RESPONDENT to this proceeding; and that a copy hereof be served upon each Respondent, upon the agency of each State and the District of Columbia which has regulatory jurisdiction with respect to communications rates and services and the National Association of Regulatory Utility Commissioners; and

IT IS FURTHER ORDERED, That hearings in Docket No. 18128 ARE DEFERRED until further order of the Commission; and

IT IS FURTHER ORDERED, That the petition of Air Transport Association filed March 25, 1968, insofar as it requests consolidation of Docket No. 18128 with Docket No. 16258 IS DENIED.

IT IS FURTHER ORDERED, That all of the petitions noted as under consideration herein are GRANTED to the extent indicated herein, and in all other respects are DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple

Ben F. Waple
Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

WASHINGTON, D.C.

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
LONG LINES DEPARTMENT

Revisions of Tariff F.C.C. No. 260, Private
Line Services, Series 5000 (TELPAC)

DOCKET NO. 18128

O R D E R

Adopted July 24, 1968 ; Released July 29, 1968

By the Commission: Chairman Hyde absent; Commissioner Cox abstaining
from voting.

1. By Order adopted April 10, 1968, and released April 12, 1968 (FCC 68-388), the Commission instituted an investigation, pursuant to Section 204 of the Communications Act of 1934, as amended, into the lawfulness of revised tariff schedules filed by American Telephone and Telegraph Company (A.T.&T.) on March 25, 1968, under its Transmittal No. 10069, which would effectuate substantial increases in TELPAK rates. Further, in that order, the effective date of the proposed tariff schedules was suspended from June 1, 1968, to September 1, 1968 - the full three month period beyond the time when it would otherwise go into effect - as authorized by Section 204 of the Act.

2. Similarly revised TELPAK tariff schedules were originally filed by The Western Union Telegraph Company (Western Union) in its Tariff F.C.C. No. 237 on March 1, 1968, under its Transmittal No. 6186, to become effective April 1, 1968; the effective date of the revised schedules was deferred until June 1, 1968, by Western Union under Transmittal No. 6193 (filed March 27, 1968); the effective date was again deferred, this time until September 1, 1968, under Transmittal No. 6213 (filed May 21, 1968). In view of the deferral of the effective date until September 1, 1968, the same date that the suspension expires and A.T.&T.'s TELPAK revisions become effective, there was no occasion to suspend Western Union's revised TELPAK schedules.

3. By Order adopted July 11, 1968, and released July 16, 1968 (FCC 68-711), the Commission instituted an investigation and hearing into the lawfulness of charges by A.T.&T. for private line services in general,

including charges for teletypewriter station equipment. The investigation of A.T.&T.'s TELPAK rates ordered in the April 12, 1968 Order (FCC 68-388) was included in the private line investigation. In the same Order, the Commission suspended the revised tariff schedules increasing A.T.&T.'s charges for teletypewriter station equipment for the full three month period authorized by Section 204 of the Act - from the proposed effective date of August 1, 1968, until November 1, 1968.

4. In view of our investigation of A.T.&T.'s revised TELPAK schedules and the expansion of that investigation to include A.T.&T.'s private line schedules in general, and as Western Union has similarly revised TELPAK schedules and has revised tariff schedules increasing its charges for teleprinter station equipment (the equivalent of A.T.&T. teletypewriter station equipment), and is otherwise competitive with A.T.&T. in private line tariff offerings, the same questions are raised as to the lawfulness of the equivalent Western Union tariffs. Therefore, it is the view of the Commission that the lawfulness of the Western Union private line charges, including charges for Western Union TELPAK and teleprinter station equipment, should also be determined and that the effective date for the revised tariff schedules for Western Union teleprinter station equipment should be suspended from the proposed August 1, 1968, date until November 1, 1968.

5. Accordingly, IT IS ORDERED, That, pursuant to Sections 201, 202, 204, 205 and 403 of the Communications Act of 1934, as amended, the hearing and investigation in Docket No. 18128 concerning the lawfulness of the private line tariff schedules of American Telephone and Telegraph Company SHALL INCLUDE like schedules of The Western Union Telegraph Company in its Tariff F.C.C. No. 237, and that the issues heretofore specified in that docket SHALL APPLY with equal force to the tariff schedules of The Western Union Telegraph Company.

6. IT IS FURTHER ORDERED, That, pursuant to Section 204 of the Communications Act of 1934, as amended, the operation of the tariff schedules listed in the Appendix hereto as becoming effective August 1, 1968, IS HEREBY SUSPENDED, unless otherwise ordered by the Commission, until November 1, 1968, and that during said period of suspension no changes shall be made in said tariff schedules or in the charges sought to be altered thereby unless authorized by special permission of the Commission.

7. IT IS FURTHER ORDERED, That, in the event a decision as to the lawfulness of all the provisions suspended has not been made during the suspension period, and said increased charges, practices, classifications, and regulations go into effect, The Western Union Telegraph Company shall, as provided in Section 204 of the Communications Act of 1934, as amended, and until further ordered by the Commission, keep accurate account of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision therein, the Commission may by further Order require the refund thereof, with interest, pursuant to Section 205 of the Act, and the carrier shall file with the Commission a

report on or before the 10th day of each calendar month, commencing December 10, 1968, showing the amounts accounted for as aforesaid during the previous calendar month;

8. IT IS FURTHER ORDERED, That a copy of this Order be filed in the offices of the Commission with said tariff schedules herein suspended; that Western Union IS HEREBY MADE Party Respondent to this proceeding; and that a copy hereof be served upon such Respondent, upon the agency of each State and the District of Columbia which has regulatory jurisdiction with respect to communications rates and services and the National Association of Regulatory Utility Commissioners.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple

Ben F. Waple
Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
and the Associated Bell System Companies

Charges for Interstate and Foreign Communi-
cation Service

)
)
) Docket No. 16258
)
)

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

Charges, Practices, Classifications, and
Regulations for and in Connection with
Teletypewriter Exchange Service

)
)
) Docket No. 15011
)
)
)

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
Long Lines Department

Revisions of Tariff F.C.C. No. 260, Private
Line Services Series, 5000 (TELPAK)

)
)
) Docket No. 18128
)
)
)

OPPOSITION TO PETITION FOR RECONSIDERATION
(To Be Acted Upon by the Commission)

American Telephone and Telegraph Company (AT&T)
submits herewith its opposition to the Petition for Recon-
sideration of Memorandum Opinion and Order (FCC 68-711), dated
August 5, 1968, filed on behalf of Bethlehem Steel Corporation
and certain other private line and TELPAK service users (Peti-
tioners). In support of this opposition AT&T respectfully
states as follows:

1. The principal thrust of the Petition for Reconsideration appears to be to find a way to deal with the matters involved in the pending rate increases in the context of "a more meaningful dialogue than that resulting from formal pleadings" (Petition, para. 7) and to persuade the Commission "to use its good offices to prevail upon AT&T (and Western Union) to postpone the effectiveness of the rate increases" (Petition, para. 10). Since AT&T could not prevent, if it wished to, the making of any request by the Commission which it feels it is appropriate to make, and since in these respects the Petition does not appear to raise any legal questions, we do not feel called upon to comment.

2. To the extent that the Petition requests a Commission order requiring the carriers to reschedule the pending rate increases, AT&T must emphatically oppose for the reason that the Commission has no authority to issue such an order. In this respect the Petition seeks an order by the Commission which would, peremptorily and without a hearing, require a change in filed tariff schedules. The action requested in this Petition is similar to that requested in earlier petitions filed by these Petitioners relating to these rates (Petition to Reset Order Adopted April 10, 1968, dated May 10, 1968; Petition for Rescheduling or Suspension of Teletypewriter Rate Increases, dated July 2, 1968). That the Commission does not have authority under the Communications Act to issue such orders

has been shown in the pleadings filed by AT&T with respect to its Transmittals Nos. 10001 and 10069, in particular its Opposition, dated February 9, 1968, with respect to Transmittal No. 10001 dealing with similar contentions as to the extent of Commission authority under the Act, and its Opposition dated May 23, 1968 in Docket No. 18128, which specifically (para. 3) considered the argument made by these Petitioners in their May 10, 1968 Petition. Under the regulatory scheme set up in the Communications Act, the power of suspension granted in Section 204 is the exclusive authority in the Commission to take summary action with respect to the effectiveness of filed tariff schedules. See Arrow Transportation Co. v. Southern Ry., 372 U.S. 658 (1963). The Commission has suspended the rates with which the instant petition is concerned pursuant to Section 204 of the Act "to the full extent of [its] statutory authority." (Order of April 10, 1968, FCC 68-388, suspending revised TELPAK rates, para. 8.) The lack of Commission authority to take summary action to defer or modify the effectiveness of rates, in excess of the suspension power granted by Section 204, is discussed at more length in AT&T's Opposition to be filed in Docket No. 18128 on August 21, 1968, to the Petition for Interim Relief, date August 6, 1968, of Aerospace Industries Association of America.

3. Much has been said by Petitioners with respect to the impact of the proposed rate increases upon their operations. The Bell System companies have also been concerned about the impact on their customers of these increases. It is for that reason that AT&T has taken many actions since January 9, 1967 (when the teletypewriter rates were filed to be effective May 1, 1967, and a specification of the TELPAK rate increases originally proposed was distributed) to defer the effective date of the increased rates and to reduce the increases in TELPAK rates substantially below the levels originally proposed. (See para. 3 of the Commission's Memorandum Opinion and Order of July 10, 1968, FCC 68-711.) Petitioners also urge that the accounting order issued herein will have an untoward side effect in "that it may harden AT&T's determination to drive for rates even higher than those now under consideration" (Para. 15 of Petition.) In this regard it should be pointed out that the TELPAK rates now under consideration are in our view at levels lower than we consider appropriate and constitute an intermediate step in achieving the appropriate level. (See AT&T Application No. 643 dated March 13, 1968.) As pointed out in Application No. 643 the substitution of these rates for the higher rates previously filed was in consideration of the impact of the higher rates on customers.

4. The Petition asks that the issues in Docket No. 18128 be enlarged "to include an inquiry into the desirability and advantages of scheduling any rate increases found justified and required, and exceeding 10% of the presently effective rates, in appropriate annual increments." It is our belief that it is unnecessary to enlarge the issues as requested in the Petition. If the evidentiary record supports an incremental approach such as that advocated by Petitioners, the issues specified by the Commission in this proceeding are adequate to accommodate such treatment.

WHEREFORE, it is submitted that the Petition for Reconsideration should be denied.

Respectfully submitted,

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

By /s/ Ernest D. North
Ernest D. North

By /s/ Alfred A. Green
Alfred A. Green

195 Broadway
New York, New York 10007

Its Attorneys

August 19, 1968

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of)

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,)
LONG LINES DEPARTMENT)

Docket No. 18128

Revisions of Tariff F.C.C. No. 260,)
Private Line Services, Series 5000 (Telpak))

OPPOSITION

(To Be Acted Upon by the Commission)

The Bell System Respondents hereby oppose the
Petition for Interim Relief of Aerospace Industries
Association of America, Inc. (AIA), dated August 6, 1968.
In support of such opposition Respondents respectfully
state as follows:

1. AIA requests an order staying the increases
in rates and charges for private line services now under
suspension, which were made the subject of hearings by the
Commission's Memorandum Opinion and Order (FCC 68-711)
adopted July 10, 1968, "until such time as the Commission
issues a final decision, following a hearing, on the
questions raised by such increases." In support of this
request AIA argues that the Commission's action in
FCC 68-711 in postponing hearings in Docket No. 18128 until

rate principles are determined in Docket No. 16258 and the TELPAK sharing proceeding (Docket No. 17457) is completed "cannot be squared with" the requirement of Section 204 of the Act that the Commission, in any hearing involving a rate increase, shall give preference to the hearing and decision of questions involving the justness and reasonableness of the increased charges "and decide the same as speedily as possible." Such inconsistency, it is urged, indicates that the Commission, contrary to what it said in its Order, did not act pursuant to Section 204 and therefore authority for its action must be found in Sections 4(i) and 303(r) of the Act. AIA then argues, in effect, that the Commission's Order to postpone the hearing in this docket "can only be validated" by granting the relief requested (Petition, page 3) - a deferment of the effective date of the rates beyond the statutory suspension period. AIA contends that authority to take such action can be found in Sections 4(i) and 303(r).

2. The argument is novel but completely unsound. Under the regulatory structure of the Communications Act, which was patterned after the Interstate Commerce Act, a carrier has the right to initiate a rate by filing it with the Commission, and such rate automatically becomes the legally effective rate after the notice period provided

by the Act (Section 203; see United States v. Illinois Central RR, 263 U.S. 515, 522 (1924); Skinner & Eddy Corp. v. United States, 249 U.S. 557, 564-65 (1919).) Sections 204 and 205 of the Communications Act give the Commission explicit powers, "after full hearing" or "full opportunity for hearing," to make orders with respect to rates filed by a carrier. Section 204 includes the additional power to suspend the operation of any new rate filed by a carrier, pending hearing and decision, "but not for a longer period than three months." The suspension power is coupled with the provision that, if the proceeding has not been concluded and an order made within the suspension period, the proposed rates "shall go into effect at the end of such period." If increased rates are involved, provision is made for the keeping of accounts by the carrier with respect to amounts received by reason of the increase, and for refunds of such portions of the increased rates as are found not justified. No amount of argument can conjure up from the generality of the language of Sections 4(i) or 303(r) or from any other provision of the Act a power to stay, pending hearing, the effectiveness of filed rates beyond the suspension period specified in Section 204.*

*/ The Commission itself, in suspending the TELPAK rate increases, declared, "We are suspending the proposed tariff schedules to the full extent of our statutory authority" (Order of April 10, 1968, FCC 68-388, para. 8.)

3. The position of AIA is premised on the proposition that the Commission's action in deferring hearings in Docket No. 18128 did not comply with Section 204. If AIA believes that this is so, the appropriate way for AIA to have raised that question would have been to petition the Commission for reconsideration of its action and for the setting of an earlier hearing in Docket No. 18128.

4. The Commission presumably considered that in the circumstances here presented its action was in accord with the requirements of Section 204 for the reasons set out in its Order. But even if it were to be assumed for the purpose of AIA's argument that the Commission's action did not comply with the expedition requirement of Section 204, such action cannot be "validated" by another action which exceeds the Commission's statutory authority. Section 204 sets specific limits upon the suspension power which is conferred by the Act. It would be a strange doctrine indeed which would make a failure on the part of the Commission to comply with another provision in that section a justification for exceeding these statutory limits.

5. The relief requested by AIA's Petition calls for an order by the Commission which would, peremptorily and without a hearing, postpone the effective date of properly filed tariff schedules beyond the date to which the Commission has suspended them in the full exercise of

the suspension authority conferred upon the Commission by the regulatory statute. The whole structure and history of the regulatory scheme embodied in the Communications Act preclude the existence of any Commission power to issue such an order.*/

6. Section 204 of the Communications Act is based on Section 15(7) of the Interstate Commerce Act.**/ The legislative history of Section 15(7) and the cases interpreting that section demonstrate that there is no power to defer, without a hearing, the effective date of rates filed by a carrier except in accordance with the statutory grant of the suspension power.

7. Prior to the enactment of the Mann-Elkins Act of 1910, the ICC lacked power to restrain proposed rates from going into effect. 1 Sharfman, *The Interstate Commerce Commission*, 50-51 (1931). The Mann-Elkins Act authorized the ICC to suspend proposed rates for an initial period of 120 days but provided that, if the hearing could not be concluded within 120 days, the period of suspension could be extended for six months. 1 Sharfman, op. cit. supra

*/ The lack of such power has been pointed out in the pleadings filed by AT&T with respect to its Transmittals Nos. 10001 and 10069. See in particular its Opposition dated February 9, 1968 with respect to Transmittal No. 10001 and its Opposition dated May 23, 1968 in Docket No. 18128.

**/ S. Rep. No. 781, to accompany S. 3285, 73d Cong., 2d Sess. 4 (1934); H.R. Rep. No. 1850, to accompany S. 3285, 73d Cong., 2d Sess. 5 (1934); 78 Cong. Rec. 8824 (May 15, 1934); 78 Cong. Rec. 10313 (June 2, 1934).

at 58. As Sharfman noted, the Commission characterized its "authority to suspend proposed advances in rates pending investigation of their propriety" as "perhaps the most far-reaching and fundamentally important power conferred by the 1910 legislation." Annual Report, 1910, page 5. See 1 Sharfman, op. cit. supra at 58, n.60. The ten-month suspension period of the Mann-Elkins Act was found to work undue hardship on the carriers and therefore the Transportation Act of 1920 reduced the total period of suspension from ten to five months. Upon failure of the Commission to issue an order within this prescribed period, the proposed changes in rates were automatically to become effective. As a protection to the shipper, in case of increases in rates, the Commission was empowered to require the carriers involved to keep accounts and to refund with interest such portions of increased rates as were found not justified. 1 Sharfman, op. cit. supra at 201-03. In 1927 the five-month limitation was changed to the seven-month limitation now found in Section 15(7). Clearly these amendments of the time limitation in Section 15(7) would have been unnecessary if the ICC had power to defer the effective date of proposed rates beyond the period specified in Section 15(7).

8. It was established in Arrow Transportation Co. v. Southern Ry., 372 U.S. 658 (1963), that the power to suspend conferred by Section 15(7) is the exclusive authority

under the Interstate Commerce Act to defer, without hearing, the effectiveness of carrier-filed rates and that the courts are without power to enjoin their effectiveness beyond the period specified in that section. The Supreme Court reached its conclusion by analysis of the statutory provisions and a review of their legislative history. While the Court was dealing with a request for injunctive relief, it was implicit in the situation with which the Court was concerned (and expressly stated in the dissenting opinion, 372 U.S. at 677) that the Commission, having suspended the rates in question for the full statutory period, had no further power to prevent the rates from going into effect. The Court pointed out that "The statute expressly provides that 'the proposed change of rate . . . shall go into effect,' if the Commission's proceeding has not been concluded and an order made within the period of suspension. . . ." 372 U.S. 658 at 659-60. Under the Arrow Transportation case there can be no extension of the suspension period specified in the statute without the consent of the carrier.*

*/ The District Court had concluded, affirmed by the Court of Appeals, Fifth Circuit, whose judgment was affirmed by the Supreme Court, that:

"Section 15(7) of the Interstate Commerce Act grants exclusive authority to the Interstate Commerce Commission to suspend proposed railroad rates and limits that authority to a period of seven months from the proposed effective date of the rates unless further extended by consent of the carriers proposing the rates." (308 F.2d 181 at 183 (CA 5, 1962).)

9. The legislative history of Section 204 of the Communications Act shows the intent of Congress to limit the Commission's power to defer the effective date of proposed rates to the three-month period specified therein. When the bills which led to enactment of the Communications Act of 1934 were being considered by Congress, the ICC made a detailed study of and recommendations with respect to the proposed legislation. In this study the ICC took the position that the change from the seven-month suspension period in the Interstate Commerce Act to the three-month period under proposed Section 204 would interfere with the effective administration of the proposed legislation. The ICC declared: ". . . A three-month period of suspension has proved impracticable in the administration of the Interstate Commerce Act and unquestionably would be found impracticable under the bill. The provision for entry of accounting orders does not meet the situation. Such orders are likewise provided by the Interstate Commerce Act, yet the latter permits a seven-month suspension period. . . ." Hearings on S. 2910 Before the Senate Comm. on Interstate Commerce, 73d Cong., 2d Sess. 205 (1934); Hearings on H.R. 8301 Before the House Comm. on Interstate and Foreign Commerce, 73d Cong., 2d Sess. at 93 (1934). The position taken by the ICC was rejected by Congress which enacted the three-month limitation set forth in Section 204.

10. In 1964 this Commission sought an amendment of the Communications Act which would extend the suspension period from three to nine months. In hearings on the proposed legislation Commissioner Hyde, speaking for the Commission, declared that ". . . in most of the important cases the hearing procedure has taken much longer than the 90 days and we have either had to ask the carrier to agree to a continued suspension or the tariff has by operation of law become effective without a finding by the Commission as to the justness, reasonableness and lawfulness of the tariff. . . ." Hearings on H.R. 6018, H.R. 8013 and H.R. 10270 Before the House Comm. on Interstate and Foreign Commerce, 88th Cong., 2d Sess. 20-21 (1964). Clearly the form of Section 204 sought by the ICC and the amendment of Section 204 sought by the Commission would have been unnecessary if the Commission had authority to postpone proposed rates for longer than the three months specified in Section 204. If the Commission had the power for which AIA contends, the three-month limitation on the period of suspension provided by Section 204, and the words in that section "shall take effect at the end of such period," would be nullities.

11. There is nothing in the two I.C.C. cases*/

*/ Grain and Grain Products Between Kansas, Missouri, and Texas Points, 115 I.C.C. 615 (1926); Rodney Milling Co. v. St. Louis S.F. Ry. Co., 147 I.C.C. 569 (1928) [incorrectly cited by AIA as 147 I.C.C. 599].

cited in the AIA Petition (para. 11) which supports AIA's position. In neither of these cases did the ICC imply that it had power, absent a full hearing, to prevent rates from going into effect upon the expiration of the statutory suspension period. In the Grain and Grain Articles case relied on in the Rodney Milling Co. case, the ICC expressly stated that the Interstate Commerce Act fixes the period during which it could postpone the operation of proposed schedules. 115 I.C.C. at 617.

12. Nor does United States v. Southwestern Cable Co., 88 S. Ct. 1994 (1968), upon which heavy reliance is placed by AIA, provide support for AIA's position. The Court was dealing in that case with the regulation of an industry (CATV) for which a regulatory system was not spelled out in the Communications Act - an industry not even contemplated at the time the Act was passed. In the absence of express provisions for the regulation of CATV, the Court found in Sections 4(i) and 303(r) authority to regulate and to issue the orders under attack. In finding FCC authority to issue the orders complained of in that case, the Court expressly concluded that Sections 312(b) and (c) - which authorize cease and desist orders under specified circumstances - were inapplicable to the situation there presented. It is significant that the Commission did not rely on Sections 312(b) and (c) in issuing the orders involved in the

Southwestern Cable case. Midwest Television, Inc., 4 F.C.C. 2d 612. The instant case presents an entirely different situation. Regulation of the common carrier communications industry dates back many years prior to the enactment of the Communications Act. That Act spells out a well-defined system of regulation, including in Section 204 a specific but limited power to suspend carrier-filed rates pending hearing. It is unquestioned that Section 204 is applicable in the situation in which the Commission has acted and the Commission has expressly relied on Section 204 in suspending these rates "to the full extent" of its statutory authority. There is nothing in the Southwestern Cable Co. case to give the Commission under Sections 4(i) and 303(r) authority expressly withheld in other provisions of the statute. Whatever general power may have been granted by these sections, they cannot be construed to override the specific limitations of the suspension power provided in Section 204.*

13. The Commission's interpretation of its statutory authority to postpone the effectiveness of proposed increased rates is correct and is fully supported by the foregoing analysis of the Communications Act. The action sought by AIA's Petition would be contrary to the express and clear

*/ In fact, the actions permitted by Sections 4(i) and 303(r) must be "not inconsistent with this Act" and "not inconsistent with law," respectively.

language of the Communications Act, to the regulatory scheme spelled out in the Act, and to the legislative history and established interpretation of the Act.

14. One further point in AIA's Petition calls for comment. In support of its position that, assuming the Commission has the requisite authority, it should grant the deferment requested AIA states:

"Further, the circumstances preceding AT&T's currently scheduled Telpak increases are such as to cause considerable doubt as to their lawfulness or to AT&T's entitlement to equitable consideration." (Petition, para. 16)

The "circumstances" adverted to appear to be the difference in level and structure of TELPAK rates between the schedules filed to become effective April 1, 1968 (Transmittal No. 10001) and those filed to become effective June 1, 1968 (Transmittal No. 10069). AT&T has clearly pointed out that the lower June 1, 1968 level of rates represents an intermediate step in the process of ultimately effectuating the rates embodied in the schedules originally filed to become effective April 1, 1968, which rates it deemed to be appropriate (Application No. 643, dated March 13, 1968). Application No. 643 also shows that the filing of the lower June 1 rates was in recognition of the substantial impact of the April 1 rates upon customers. In these circumstances AIA cannot properly argue that the filing of these lower rates somehow reflects on their lawfulness. The filing of

these lower rates provides no basis for an inference that they are unlawful.

WHEREFORE, the AIA Petition for Interim Relief should be denied.

Respectfully submitted,

BELL SYSTEM RESPONDENTS

By Harold J. Cohen
Harold J. Cohen

By Marian Jean Dabney
Marian Jean Dabney

By Alfred A. Green
Alfred A. Green

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Their Attorneys

August 20, 1968

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 68-372
20125

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
LONG LINES DEPARTMENT

DOCKET NO. 18128

Revisions of Tariff F.C.C. No. 260, Private
Line Services, Series 5000 (TELPAC)

O R D E R

Adopted August 28, 1968; Released September 3, 1968

By the Commission: Commissioner Wadsworth absent; Commissioner
Johnson concurring in the result.

1. The Commission has before it:

(a) The "Petition to Reset Order Adopted April 10, 1968
and to Reschedule Increases in TELPAK Rates," filed May 10,
1968, on behalf of Bethlehem Steel Corporation, et al.; ¹/₁

(b) The "Petition of Penn Central Company for Reconsidera-
tion and Suspension or Modification of the Commission's Order
(F.C.C. 68-388) Released April 12, 1968, and for Other Relief,"
filed May 13, 1968, by Penn Central Company;

(c) An "Opposition" to the Petitions of Bethlehem Steel
Corporation, et al., and Penn Central Company, filed on May 21,
1968, by The Western Union Telegraph Company;

(d) An "Opposition" to the above-indicated Petitions, filed
May 23, 1968, by American Telephone and Telegraph Company;

(e) A "Reply to Oppositions of American Telephone and Tele-
graph and Western Union Telegraph Company," filed June 4, 1968
by Bethlehem Steel Corporation, et al.;

(f) The "Petition for Reconsideration of Memorandum Opinion
and Order (FCC 68-711)," filed August 5, 1968 on behalf of

¹/Bethlehem Steel Corporation, Ford Motor Company, Monsanto Company, Northrop
Corporation, Olin Mathieson Chemical Corporation, Republic Steel Corporation,
Union Carbide Corporation, United States Steel Corporation and Westinghouse
Electric Company.

Bethlehem Steel Corporation, et al.;2/

(g) The "Petition for Interim Relief," filed August 6, 1968, on behalf of Aerospace Industries Association of America, Inc.

(h) A "Statement in Support of Petition for Interim Relief," filed August 13, 1968, on behalf of Bethlehem Steel Corporation, et al.;2/

(i) A "Statement in Support of Petitions," filed August 13, 1968, on behalf of the American Trucking Associations, Inc.;

(j) An "Opposition to Petitions for Reconsideration of Memorandum Opinion and Order (F.C.C. 68-711)," filed August 19, 1968, by The Western Union Telegraph Company;

(k) An "Opposition to Petition for Reconsideration," filed August 20, 1968, by American Telephone and Telegraph Company;

(l) An "Opposition" to the "Petition for Interim Relief," filed August 21, 1968, by American Telephone and Telegraph Company; and

(m) A "Reply of Aerospace Industries Association of America, Inc. to Oppositions to Petition for Interim Relief," filed August 23, 1968, on behalf of Aerospace Industries Association of America, Inc.

2. In their Petition of May 10, 1968, Petitioners Bethlehem Steel Corporation, et al., each being a large user of TELPAK services, request that the Commission order that the effective date of the TELPAK tariff revisions be rescheduled, subject to the outcome of the present investigation (instituted by Commission Order adopted April 10, 1968 - F.C.C. 68-388) and that any rate increases that may be ordered as a result of this proceeding be scheduled to become effective in three annual increments.

2/ E. I. DuPont de Nemours & Company, Inc., joins Bethlehem Steel Corporation, et al., in this Petition and Statement.

3. In its Petition, Penn Central Company, a TELPAK user, requests that the Commission vacate its Order of suspension and investigation herein, reject the revised TELPAK tariff revisions or postpone indefinitely the effective date of such revised tariff schedules, pending a determination of Phase 1-B of Docket No. 16258 and the conclusion of Docket No. 17457 (TELPAK Sharing).

4. In opposing the Petition of May 10, 1968, filed by Bethlehem Steel Corporation, et al. and the Petition of Penn Central Company, The Western Union Telegraph Company argues that the Commission is without statutory authority to suspend the proposed rate revisions beyond the suspension period expiring September 1, 1968, which was ordered by the Commission in its Order released April 12, 1968; it is further argued that a common carrier has a basic right to change its rates subject to provisions of the Communications Act of 1934.

5. In its Opposition to the Petition filed by Bethlehem Steel Corporation, et al., on May 10, 1968, and the Petition of Penn Central Company, American Telephone and Telegraph Company also contends that the Commission does not have the statutory power to comply with Petitioners' request.

6. In replying to the Oppositions filed by American Telephone and Telegraph Company and The Western Union Telegraph Company, Petitioners Bethlehem Steel Corporation, et al., contend that the scope of their request is limited to the rescheduling of the rate increases over a period of three years instead of the entire increase becoming effective at once; it is thus argued that the Commission is not without the necessary statutory authority.

7. In their Petition for Reconsideration, filed August 5, 1968, Bethlehem Steel Corporation, et al., indicate that their original Petition, filed May 10, 1968, was not accorded any consideration in the Memorandum Opinion and Order adopted July 11, 1968, and released July 16, 1968, in which the Commission instituted an investigation and hearing into the lawfulness of charges by American Telephone and Telegraph Company for private line services in general. However, as the Commission is herein presently considering Petitioners' May 10, 1968, Petition and had contemplated such separate treatment at the time of its July 16, 1968, Memorandum Opinion and Order, full consideration is being accorded to the Petition for Reconsideration.

8. Aerospace Industries Association of America, Inc., in its Petition, seeks an "Order for Interim Relief" staying the increases in charges for private line services by American Telephone and Telegraph Company and The Western Union Telegraph Company until the Commission has held a hearing and issues a final decision on the questions raised by such increases.

9. The Commission has considered the points raised in the above-referenced pleadings and in light of the Commission's Order, released April 21, 1968, and the applicable statutory provisions, is of the view that the Petitions herein must be denied.

10. While the Commission gave careful consideration to the position of Petitioners as large volume users of TELPAK services in its Order of investigation in this proceeding, we are without statutory authority to grant the relief requested. Section 204 of the Act clearly provides in pertinent part that:

"Whenever there is filed with the Commission any new charge . . . The Commission may . . . enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission . . . may suspend the operation of such charge . . . but not for a longer period than three months beyond the time when it would otherwise go into effect . . ." (emphasis added.)

The Commission did suspend the operation of such charges from June 1, 1968, to September 1, 1968 - the full three month period allowed by Section 204. In the Order released April 12, 1968 (FCC 68-388), we noted that ". . . users have been on notice since 1961 that TELPAK rates presented substantial questions of lawfulness . . . and that significant increases in these rates could result."

11. Furthermore, the Commission cannot reschedule the effectiveness of the September 1, 1968, increase in rates prior to completion of the hearing process, even if the Commission determines in due course that the increase itself is unlawful. Under Section 205 of the Act the Commission is authorized to prescribe "just and reasonable charges" but only ". . . after full opportunity for hearing . . . the Commission shall be of opinion that any charge is or will be in violation of any of the provisions of this Act . . ." Thus, it is clear that we would contravene

the express statutory language of Section 205 if we were to attempt to modify as requested the schedule of charges timely filed by the carrier pursuant to Section 203 of the Act. 3/

12. Petitioners cite the decision of the U. S. Supreme Court in U. S. v. Southwestern Cable Co., ____ U. S. ____, 88 S. Ct. 1994 (1968) as authority for the Commission's power to grant the relief requested under the general powers contained in Sections 4(i) and 303(r) of the Act, and quote extensively from the brief on behalf of the U. S. and F.C.C. in that case. Suffice it to say that the specific and limited authority set forth in the Act with respect to tariff filings delimits the Commission's power in this respect as opposed to the more general powers which were controlling in the Southwestern Cable case.

13. Aerospace Industries appears to be under the misapprehension that our deferral of proceedings in this docket amounts to a deferral of hearings on the proposed increases in TELPAK rates. As we have stated on numerous occasions, the overall level of TELPAK rates, including the increased rates effective September 1, 1968, is directly at issue in Docket No. 16258 and may be affected by our action in Docket No. 17457, both of which we have ordered expedited. At issue in Docket No. 18128 are the internal rate structure components of which we do not understand Aerospace Industries to complain.

Accordingly, IT IS ORDERED, That the above-referenced Petitions of Bethlehem Steel Corporation, et al., Penn Central Company and Aerospace Industries Association of America, Inc., ARE HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Ben F. Waple
Secretary

3/ Certain of the petitioners have suggested that the Commission request the carriers to voluntarily postpone the effective date of the scheduled increases. After noting that we were suspending the schedules to the full extent of our statutory authority, on our order of April 12, 1968, supra, we stated: "This means that the schedules will become effective September 1, 1968." Nothing has occurred in the meantime to cause us to retreat from that statement.

NEWS

Federal Communications Commission
1919 M Street, NW.
Washington, D.C. 20554
Public Notice



33548

June 5, 1969 - G

FCC TO DISCUSS REVENUES, EARNINGS AND RATES WITH AT&T

The American Telephone and Telegraph Company has been informed by the Federal Communications Commission that, in line with its policy of continuing surveillance, it has been reviewing the continuing growth in the level of AT&T interstate revenue and earnings and the need, if any, for rate adjustments. The Commission said it would hold discussions on these matters beginning on July 7.

Over for letter to AT&T.

(over)

211

FEDERAL COMMUNICATIONS COMMISSION*

WASHINGTON, D.C. 20554

FCC 69-638

June 5, 1969

IN REPLY REFER TO:

9100

American Telephone and Telegraph Company
195 Broadway
New York, N. Y. 10007

Attention: Mr. D. E. Emerson
Vice President

Gentlemen:

In keeping with its policy of continuing surveillance, the Commission has been reviewing the continuing growth in the level of your interstate revenues and earnings, changes in the nation's economy during recent years, and the need, if any, for rate adjustments that may be required in the public interest. We have also taken note of your letter of May 28 concerning this matter.

Accordingly, we shall hold discussions, commencing on July 7, 1969, concerning these matters. We expect your company to present its definitive views, with appropriate documentation and supporting data, as to the effects of current conditions on your interstate earnings requirements, together with your projection of interstate operating results for the calendar year 1969. In this connection, your presentation is to be made with due regard for the factors and considerations which provided the framework for our decision in the first phase of Docket No. 16258. After we have heard your presentation, we shall schedule such further sessions as will be necessary to provide an adequate basis for an informed resolution of the matters involved. As in the past, a reporter's record of the proceedings will be made and will be available for public inspection.

It will conserve time and effort of all concerned if, one week in advance of the initial session, you furnish a written summary of your proposed presentation and the exhibit materials upon which you intend to rely, as well as a statement identifying the persons who will participate in making your presentation.

This letter was adopted by the Commission on June 5, 1969, Commissioner Johnson concurring in the result.

BY DIRECTION OF THE COMMISSION

* Not part of record certified by Commission.

Rosal H. Hyde
Chairman

NEWS

Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554
Public Notice



34238

June 27, 1969 - G

DISCUSSION OF AT&T RATES, REVENUES AND
EARNINGS TO BEGIN JULY 10*

The American Telephone and Telegraph Co. (AT&T) has been notified by the Federal Communications Commission that discussions on interstate rates and revenue requirements will begin on July 10 at 9 AM. The sessions had originally been scheduled to start on July 7. In a letter to AT&T, FCC Chairman Rosel H. Hyde said the new schedule was necessary because of developments that have occurred since June 5, when AT&T was first notified of the meetings.

In its original letter, the Commission said that in keeping with its policy of continuing surveillance, it had been reviewing the continuing growth in the level of AT&T interstate revenue and earnings and the need, if any, for rate adjustments. AT&T was asked to present its "definitive views, with appropriate documentation and supporting data, as to the effects of current conditions on...interstate earning requirements, together with... (a)...projection of interstate operating results for the calendar year 1969." The Commission said a reporter's record of the proceeding will be made available for public inspection.

AT&T was requested to submit a written summary of its presentation at least one week in advance of the July 10 meeting.

- FCC -

* Not part of record certified by Commission.

NEWS

Federal Communications Commission
1919 M Street, NW.
Washington, D.C. 20554
Public Notice



34611

July 11, 1969 - C

DISCUSSION OF AT&T RATES, REVENUES AND EARNINGS POSTPONED UNTIL SEPTEMBER 8*

In response to a request from the American Telephone and Telegraph Co., the Federal Communications Commission has postponed from July 10 to September 8 discussions on AT&T interstate rates and revenue requirements. AT&T asked for the extension to permit it to complete its presentation.

In a letter to AT&T vice president, D. E. Emerson, FCC Chairman Rosel H. Hyde said that the Commission was agreeing to the postponement in view of the problems outlined by AT&T in a July 1 letter. He said that official commitments of both Commissioners and staff, however, would not permit rescheduling the discussions before September.

AT&T was asked to submit its complete presentation by August 8 to permit review by the Commission and staff in order to expedite "consideration and resolution" of the issues. The Chairman said that the week of September 8, with the exception of the Wednesday meeting day, was being set aside for the discussions.

- FCC -

* Not part of record certified by Commission.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 69-842
34828

In the Matter of)	
)	
AMERICAN TELEPHONE AND TELEGRAPH COMPANY)	DOCKET NO. 16258
and the Associated Bell System Companies)	
)	
Charges for Interstate and Foreign Communi-)	
cation Service)	
)	
In the Matter of)	
)	
AMERICAN TELEPHONE AND TELEGRAPH COMPANY)	
)	
Charges, Practices, Classifications, and)	DOCKET NO. 15011
Regulations for and in connection with)	
Teletypewriter Exchange Service)	
)	
In the Matter of)	
)	
AMERICAN TELEPHONE AND TELEGRAPH COMPANY)	
Long Lines Department)	
)	
Revisions of Tariff F.C.C. No. 260, Private)	DOCKET NO. 18128
Line Services Series 5000 (TELPAX))	

MEMORANDUM OPINION AND ORDER

Adopted: July 29, 1969 ; Released: August 7, 1969

By the Commission: Commissioner Johnson dissenting and issuing a state-
ment; Commissioner H. Rex Lee abstaining from voting.

1. The Commission has before it for consideration a Statement of Rate-Making Principles and Factors in Docket No. 16258, Phase 1-3. This Statement embodies a stipulation of the parties to the proceeding and of the Common Carrier Bureau (Staff), reached on May 28, 1969 (Tr. 179-pp. 22329-22341), as well as certain procedures recommended to the Commission. It is further specified in the Statement that if the Commission should direct procedures other than those proposed (except with respect to the reopening of the record in the TELPAK Sharing Case, Docket No. 17457), then the Respondents and other parties would not be bound by the stipulations set forth therein. The Statement of Rate-Making Principles which is attached hereto as Appendix A, was entered into following a series of off-the-record conferences, open to the parties, as provided by the Order of the Telephone Committee released February 18, 1969 (FCC 69M-197). The Telephone

Committee has reviewed this matter and has forwarded the Statement to the Commission with a recommendation that the procedures set forth therein, with the exception noted below (see paragraph 13), be approved.

2. The issues in this proceeding were specified in our original Order of Investigation of October 27, 1965 (2 FCC 2d 871), and a two-phase procedure was provided by the Order released December 23, 1965 (2 FCC 2d 142). We have previously dealt with certain of the Phase 1 issues, such as rate of return, certain rate base items, and jurisdictional separations procedures. (Memorandum Opinions and Orders, July 5, 1967, 9 FCC 2d 30; September 13, 1967, 9 FCC 2d 960). The issue of the appropriate rate-making principles and factors which should govern the relationship among the rate levels for each of Respondents' principal services was, however, deferred for later consideration. (Memorandum Opinion and Order, December 9, 1966, 5 FCC 2d 844). This remainder of Phase 1 has been described as Phase 1-B.

3. Hearings in Phase 1-B began October 9, 1967 and required approximately 100 days of hearing and 12,000 pages of testimony by February 14, 1969, when the present series of hearings ended. All direct testimony has been offered. Cross-examination has been conducted on all testimony except certain fully distributed cost studies (FCC Staff Exs. 1 through 8, 37, and 48, and certain explanatory statements relating thereto, FCC Staff Exs. 53 through 55). The Bell System Respondents have not yet had opportunity to present rebuttal testimony.

4. Pursuant to the off-the-record conferences previously noted, the present statement was reached. It deals with both substance and procedure. In effect, the statement sets forth a set of principles and accompanying procedures which would be applied and tested in conjunction with the consideration of specific rate-making issues, such as those now involved in the pending Docket 18128, which embraces all private line services, including Telpak service.

5. We have reviewed the statement solely for the purpose of determining whether the implementation of the suggested procedures might facilitate the determination of appropriate rate-making principles for the interstate services of the Bell System Respondents, and, hence, permit a more definitive and timely disposition of the issues involved in Phase 1-B of this Docket. Accordingly, we express no opinion on the merits of the various positions advocated on the record. A review of the salient issues and the general nature of the evidence thus far adduced, however, is necessary background to our considerations.

6. A primary predicate of our initial Order of Investigation herein was the results of the fully distributed cost study made by Bell in the Domestic Telegraph Investigation, Docket 14650, which revealed a wide disparity in the levels of earnings among the various classes of interstate service. It was then, and still remains, our concern that the basic Message

Toll Telephone Service (MTT), for which there is no directly competitive service, and which accounts for about 80% of the interstate services, should not be burdened by, or required to subsidize, the so-called competitive services. It was, and remains, our concern that, whatever methods are employed to price MTT and other services, they should also accord with sound rate-making practice and statutory requirements. Traditionally, interstate revenue requirements for the Bell System have been determined on the basis of its net historical investment for the totality of interstate services. In addition, we also regarded an allocation of net historical investment as a principal, if not controlling, basis upon which to determine revenue requirements and rate levels for a particular class of service, with relative use being the significant measure of such allocation.

7. We have accumulated, in Phase I-B, a massive record in which the economics of pricing has been explored in detail. In this regard, the record has been benefitted by testimony from a number of eminent economists, including Drs. James C. Bonbright, William J. Baumol, J. Rhoads Foster, Paul Davidson, William Vickrey, R. B. Johnson, John W. Coughlan, Harold Wein and William H. Melody. Bell's basic presentation consisted of an attack on fully distributed costs (FDC) for rate-making purposes, and an advocacy of full additional costs, which were, according to Bell, developed in accordance with the long-run incremental cost (LRIC) principles of theoretical economics. A variety of views have been expressed as to whether or not a burden on MTT Service has occurred, or would occur, on the basis of the principles advocated by Bell. The practical difficulties of accurately measuring incremental costs in a system as complex as the telephone industry have been recognized even by advocates of incremental costs as a floor for pricing. Criticisms, likewise, have been directed to the use of fully distributed costs for pricing purposes. Moreover, some witnesses have advocated that public interest considerations could justify rate levels lower than might be supported by cost considerations alone, and one of the principles set forth in the stipulation (Par. 12), provides for such a contingency.

8. The specific statement of principles now proposed, in our judgment, properly recognizes the relevance of both fully distributed and incremental costs in considering appropriate rate levels of specific classes of service. ^{1/} We make this observation without reaching any conclusion, at this time, as to the weight, if any, that should be accorded to either or both of these factors in fixing rates for a specific service. We note, in this connection, that the statement contemplates the submission of both fully distributed and incremental cost studies, based on methodologies to be developed. It is the thrust of the statement that effective testing of the complex economic theories of costing and pricing which have been

^{1/} We note, of course, that each party to the agreement has reserved the right to assert the relevance of FDC, LRIC, or any other method of cost determination.

advanced in this record, and the reconciliation of opposing, or at least partially conflicting, views of expert witnesses, can best be accomplished by relating the principles advocated to specific rate proposals. Bell has agreed that implementing studies called for by the statement, and any related rate adjustments based thereon, can be filed by October 1, 1969 (Tr. 22342). Moreover, Respondents indicate that, if the plan is adopted, they will waive their right to present rebuttal testimony in Phase 1-B. Cross-examination on the fully distributed cost studies would likewise be unnecessary in this proceeding. We note that paragraph 11 of the Statement provides for LRIC and FDC studies at regular pre-determined intervals. We expect that such studies will be at least on an annual basis and that initially they will cover the totality of interstate services.

9. The record developed in Docket 16258 provides an examination of pricing principles which we believe is of unprecedented scope in regulatory proceedings. It affords a sound basis upon which to determine theoretical rate-making principles which can then be tested and applied in the context of rate-making proceedings dealing with Respondents' rate structure and the prices to be charged for their specific services. It is readily apparent that the techniques or methodology for developing the data needed to test and apply long-run incremental cost principles require formulation. Implementation of the Stipulation and development of such needed data will substantially benefit from the extensive testimony and cross-examination which occurred in Docket 16258, and will permit us to proceed to the testing of specific rate-making principles in the light of the issues in the Telpak-Private Line case (Docket 18128), the new Program Transmission rates, and such additional issues that may arise. Thus, if we follow the procedures recommended, the full benefits of the record so far developed will not be lost or minimized. Moreover, we believe that the procedures will enable us to reach these rate issues with greater dispatch and effectiveness than if further extended hearings were held in Docket 16258. Accordingly, it is our judgment that the proposed procedures will provide a better and more timely method of reaching a final conclusion on these important matters and will best conduce to the proper exercise of our statutory authority and promote the ends of justice. We, therefore, note the Stipulation (without necessarily approving it) and approve the procedures, except as stated in Par. 13 below.

10. In taking this action, we will incorporate the record of Phase 1-B (Vols. 77-179 of the Transcript and related exhibits, including Staff Exs. 1 through 8 and 37) into Docket 18128, in order that we may then have the full benefit of the extensive and informative record already developed and to prevent any duplication or repetition thereof in the consideration of the specific rate issue involved in that Docket. In the course of the hearing in Docket 18128, it is expected that appropriate disposition will be made of any related matters still pending in Docket 16258, such as the receipt into evidence of certain exhibits (FCC Staff Exs. 48, 53 through 55) and corrections to Networks Exs. 6 and 6A (Tr. 21176). There would also be incorporated with Docket 18128, the record of Docket 14251, the Telpak case which was previously incorporated herein.

11. Other matters presently pending in Phase 1-B, such as the TWX proceeding, Docket 15011, which was consolidated herein (Order of July 22, 1966, FCC 66-675); issues relating to the restructuring of interexchange channel rates in connection with the elimination of Telpak A and B; and increases in charges for private line teletypewriter station equipment which went into effect August 1, 1968, are awaiting the outcome of Phase 1-B (Order August 1, 1967, FCC 67-895), but in view of our action herein, will be separately treated. Accordingly, in view of the events which have transpired since the consolidation, we shall treat the TWX issue by separating Docket 15011 and disposing of it on the record in that docket. The teletypewriter station equipment rates and related issues are already included in Docket 18128 (Order of July 16, 1968, FCC 68-711), and, since any remaining questions as to those rates may be resolved in the latter proceeding, there is no need for any further action in Docket 16258 with respect to such rates.

12. When we brought the private line services within the scope of Docket 18128 by our July 16, 1968 Order, we excluded the program and video transmission services (Series 6000 and 7000 services). New rates for such services are to be filed on September 1, 1969, to be effective October 1, 1969, partly as a result of the proceeding in the Sports Network case, Docket 16043. The same rate-making principles that will be further considered in Docket 18128 will be involved in connection with the new program transmission rates. When those new rates are filed in tariffs, we will make appropriate provision for their consideration in the light of the same rate-making principles.

13. Paragraph 5(D) of the related procedures proposed in the statement is a recommendation, joined in by all the parties (but not by the Staff of the Common Carrier Bureau), that the record in the Telpak Sharing Case, Docket 17457, be reopened and consolidated with Docket 18128. For the reasons set forth in our recent denial of petitions seeking this same result (Memorandum Opinion and Order, adopted June 11, 1969, FCC 69-646), we do not adopt this recommendation.

In view of the foregoing, it is ordered that:

1. Further proceedings in Docket 16258 will be subject to further order.
2. The record of Phase 1-B of Docket 16258, consisting of Volumes 77 through 179 of the Transcript, and related exhibits, including Staff Exs. 1 through 8, and 37, together with the entire record of Docket 14251, is incorporated by reference into Docket 18128. Any required rulings with respect to such exhibits, as noted in Paragraph 10 above, shall be made in Docket 18128.

3. Docket 15011, the Teletypewriter Exchange Service case, previously consolidated herewith by our Order of July 22, 1966, is hereby separated from Docket 16258 for final disposition on the record of that Docket.

FEDERAL COMMUNICATIONS COMMISSION*

Ben F. Waple

Ben F. Waple
Secretary

Attachment

* See attached Dissenting Statement of Commissioner Nicholas Johnson.

APPENDIX A

STATEMENT OF RATE-MAKING PRINCIPLES AND FACTORS

IN DOCKET NO. 16253, PHASE 1-2 .

(Transcript Vol. 179, May 23, 1969, pp. 22329-22341)

1. The Commission recognized with respect to the instant matter:

"The proceeding is one involving several complex and very important questions. It is desirable for the Commission and the parties to focus sharply upon these questions. It is important, from the standpoint of the Commission's processes and the interests of the parties, to resolve the questions as quickly as practicable." (FCC 65-1143)

Respondents have presented their views with respect to the appropriate rate-making principles and factors which should govern the proper relationship among the rate levels for each of their principal services. The several parties, and witnesses presented by the Common Carrier Bureau (staff), also presented testimony with regard to these matters. Differences of view as to the reasonable application of theoretical principles were voiced. However, there is general recognition of significant benefits which could be derived from a proper application of those rate-making theories presented for Commission consideration in this record which are hereinafter set forth.

2. Further work needs to be done in implementing the theoretical principles in a practical manner in the communications industry. While rebuttal testimony has not yet been presented, all participants have had an opportunity to present their views on the formal record. The development of more advanced techniques can best be devised through informal procedures rather than on a formal record. In recognition of the Commission's desire to "resolve the questions as quickly as practicable", we believe that informal discussions should commence immediately, outside of Docket No. 16253, between the staff and the Bell System, with appropriate consultation with other interested persons from time to time, with the goal of arriving at appropriate methods of implementing the theoretical concepts. It is recognized that the Commission will execute its statutory obligations pending resolution of these problems and adoption of the necessary techniques.

3. It is not intended that any one of the principles be given undue weight. It is recognized that the regulatory process involves a proper balancing of both the supply and demand factors, in the light of public interest considerations, with respect to the costing and pricing of all communications services, whether in monopoly or competitive markets.

2.
4. Accordingly, the staff and the participating parties have agreed upon a set of rate-making principles, which by their very nature must be in general terms. These principles are as follows:

5. The implementation of rate making principles and factors should not impair the Bell System's opportunity to achieve its overall allowed rate of return on its interstate investment, nor should it permit an overall rate of return which is excessive.

6. In a situation where the Commission is considering adjustments in the rate levels for the MT category of service of such a magnitude that the Bell System's overall rate of return from interstate operations would be either inadequate or excessive, it should give concurrent consideration to adjustments in the rate levels for other categories of service. Any such rate level adjustments which are authorized or prescribed should take into account the rate-making principles set forth herein and should, in total, be such as to afford the Bell System the opportunity to earn its allowed overall return on interstate operations. The extent of adjustment, if any, in the rate level for any particular category of service will depend upon the statutory standards and applicable rate-making principles.

7. Fully distributed cost (FDC) studies contemplate that the total of the company's interstate recorded costs for a test period will be allocated among the various service categories in such a way that the costs so allocated to each service will add up to the total test period recorded costs of service. In a multi-service company many elements of cost will be common to two or more categories of service. There are numerous ways in which such common costs might be allocated. The need for judgment in making allocations is recognized, but the basis therefor should appear.

8. Historical book costs for interstate services should be analyzed for the purpose of obtaining information which may be useful in determining whether, during the test period, any service category has burdened^{1/} any other service category. Such analyses should, to the extent practicable, allocate the total test period historical costs in such a way as to estimate the costs that have been incurred for the provision of each service category. Consistent with the foregoing, the assignment or allocation of these costs to a service category should reflect consideration, as appropriate, of cost responsibility, relative use and any other factors which are pertinent to the purpose for which the analysis is being made.

^{1/} The determination of the existence of a "burden" will depend upon the content of the particular case.

9. A long run incremental cost (LRIC) ^{2/} study contemplates that an estimate will be made of the full amount of incremental investment and expenses which would be incurred by reason of furnishing additional quantities of service, whether in a new or an existing service category. Such a study also contemplates that, for the particular category of service, LRIC will be equal to the sum of the long run marginal costs of the added units of service. In a multi-service company many elements of cost will be common to two or more categories of service. A purpose of an LRIC study is to determine prospectively the effect on total costs, including the effect on common costs, as a result of adding units of service. The need for judgment in determining the appropriate method of estimating LRIC is recognized, but the basis therefor should appear.

10. LRIC should be analyzed for the purpose of obtaining cost information which may be useful in determining rate levels and rates for the future for each category of service.

11. In order to determine LRIC and FDC for the major categories of interstate services, the Bell System, in consultation with the FCC staff, will undertake to develop appropriate methods to be used in the production of LRIC and FDC studies at regular predetermined intervals and will go forward as promptly as possible to produce up-to-date cost data. By such formal or informal procedures as the Commission deems appropriate, interested persons will be afforded a timely opportunity to express their views with respect to the formulation of the appropriate methods.

12. The rates for any category of service should produce a rate level which is not below LRIC or, where appropriate, not below avoidable costs. If any category of service is to be priced to produce a lower level, however, such lower rate level should be supported by a determination by the Commission that it is required in the public interest. Where avoidable costs are considered as the rate level floor, and they are lower than LRIC, consideration should be given by the Commission as to whether the public interest requires that the service should be allowed to grow, or to continue, or whether it should be phased out as quickly as the facilities used to supply the service can be used to provide other services.

13. In analyzing alternative future rate levels for either an existing or a new service category, estimates of LRIC should be compared with estimates of incremental revenues for that category for a reasonable future period. Such estimates should, to the extent feasible, take into account the cross-elasticities (positive and negative) which may result from the change in rate level or from the introduction of the new service category.

^{2/} Use of the term "long run" does not preclude the treatment of costs in terms of a period relevant to the particular rate changes under consideration.

14. Rate levels for the future should be determined with reference to relevant costs, ^{2/}market conditions and public interest considerations. Where appropriate cost and non-cost data are available for consideration, neither a cost standard nor a non-cost standard taken by itself, will be used as the measure of the rate level for any service category. To improve the non-cost data presently available, further study should be undertaken regarding such subjects as the specific techniques for making analyses of the non-cost rate-making factors, the type of data required for such analyses, the procedures for obtaining the necessary data, and the information that such analyses can be expected to produce on a continuing basis.

15. In assessing market conditions, consideration should be given, as appropriate, to reasonable estimates of the following, among others: elasticities of demand, including price elasticities for various types of communications and for particular service categories, income elasticities, and cross-elasticities among substitute services whether supplied by Bell or others; existing and potential competition and competitive necessity; customer requirements; the effects of existing tariff provisions; and the effects of Commission policy upon the availability of consumer alternatives.

16. Within a given class of service, it is recognized that, for any particular rate level, more than one rate structure could be appropriate. The design of a rate structure should reflect consideration of cost and demand characteristics within the class of service, including peak versus off-peak factors.

17. The rate level for any single class of service and the ultimate rates must meet the statutory requirements that they be reasonable and not unduly discriminatory or preferential.

^{3/} It is recognized that no party is precluded by any provision herein from asserting in any rate proceeding the relevance of FDC, LRIC, or any other method of cost determination.

18. It is recognized that, in the FDC and LRIC studies to be undertaken to implement these rate-making principles, depreciation expense is a relevant cost element and depreciation reserve is a relevant component of the net investment determined for the various service categories. In allocating depreciation expense and reserve in any FDC analysis, the total of the test period expense and reserve will be allocated among the various service categories. While existing depreciation policy and practice should be studied, the determination of depreciation policy and the prescription of depreciation rates are not issues in Phase I-B. The treatment afforded these cost elements in FDC and LRIC studies of particular service categories depends upon the principles applicable to the studies undertaken.

* * * * *

For the purposes of implementing the foregoing principles, the following procedures should be utilized:

(1) The staff and the participating parties agree to the Statement of Rate-Making Principles and Factors as a basis and guide for further detailed studies of rate levels and rates of Bell's major service categories, without prejudice to the substantive or procedural rights of any party with respect to any adjustments that may result from such studies. For example, agreement to this procedure shall not limit the rights of the parties to raise, in future proceedings, questions such as those respecting rate levels for individual service categories which, but for this agreement, would have been subject to Commission decision in this proceeding.

(2) The Commission, by its Order of December 23, 1965, 2 FCC 2d 142, directed Respondents to submit, in connection with its study of rate-making principles and factors, the specific rate adjustments if any, "which they consider should be made on an interim basis in the light of such study results and the rate-making principles and factors advocated by them." While Respondents have previously submitted in this record detailed studies and have proposed or effected rate adjustments, they propose to make new studies in conformity with the principles agreed to herein, and thereafter to file such further specific rate adjustments as may be consistent therewith. Accordingly, Respondents will proceed expeditiously to make such new studies.

(3) As recognized above, the agreed rate-making principles and factors herein contained are, of necessity, rather general and non-restrictive. An adjudication of other relevant and more specific principles and factors will be required in connection with a Commission determination as to the appropriate rate level for any category of service. No carrier initiated rate level increases will be filed until the new cost studies described in paragraph (2) have been completed and made available to the parties hereto. The effective date of any such rate level increase will be subject to the determination of the Commission may possess. The parties do not

agree as to the scope of the Commission's authority under various circumstances to reject, suspend or postpone the effectiveness of carrier initiated rates, and no party, by this agreement, waives its position on this question. If, pursuant to the foregoing, a rate level increase is to become effective, it should be subject to an accounting order upon an appropriately supported request of an affected person.

(4) If the Commission should decide that formal proceedings are appropriate with respect to the rate level adjustment filed by Bell for any service category, such proceedings will be conducted in dockets separate from Docket 16258. (For example, further proceedings, if any, as to the rate level and rates for the PL Services could be held in Docket 18123.) Any unresolved issues of Docket 14251, which have been incorporated into Docket 16258 for determination, and the pertinent portions of the records of both dockets, will be incorporated into Docket 18123 for further hearing and determination.

(5) In the absence of any direction to the contrary by the Commission, the following procedures will be employed:

(A) Inasmuch as the record in Phase 1-B of Docket No. 16258 has not been closed, and proposed findings and briefs have not been filed, no Recommended Decision can be issued by the Chief of the Common Carrier Bureau, as contemplated by the Order of September 12, 1968 (FCC 68-930).

(B) Following the filing of the new studies and proposed rate adjustments by Respondents and the institution of, or continuation of, any separate proceedings (See Par. 4), the Chief of the Common Carrier Bureau will recommend that Phase 1-B of Docket No. 16258 be terminated without opinion on the merits by the Commission.

(C) If the Commission should direct procedures other than those hereinbefore proposed, or if the Bureau Chief's recommendation that Phase 1-B be terminated without opinion on the merits should not be adopted by the Commission, then the Respondents and the other parties will not be bound in any way by the foregoing agreement.

(D) It is recommended that the record in the Telpak Sharing Case (Docket 17457) be reopened, and that such docket be consolidated with Docket 18123 for further hearing and determination. (The Common Carrier Bureau takes no position on this recommendation. The parties hereto support this provision, but agree that it is not a condition precedent to this agreement. In the event this recommendation is not adopted by the Commission, no party is precluded from asserting its position in support of this recommendation, including the position of certain parties to

7.

to the effect that any decision in Docket 17457 prior to final determination of the issues now in Phase 1-B of Docket 16253, whether in Docket 16253 or in some other proceeding, would be premature and improper.)

Telephone Ratemaking Principles

[In the matter of American Telephone and
Telegraph . . . Dkt. No. 16258 Phase 1B]

Dissenting Opinion of Commissioner Nicholas Johnson

Four years ago the Federal Communications Commission began a complete investigation into the interstate and foreign communications services provided by the Bell System. Today the Commission terminates without decision an important phase of that proceeding. The issues and questions remain--and are to be taken up in further proceedings. In order to terminate the present proceeding the Commission "notes" an "agreement" worked out by the contending parties--an agreement concluded by Bell, Western Union, several user groups and the Commission's Common Carrier Bureau staff in off-the-record, closed-door conferences. After "noting" the "agreement" the Commission terminates this phase of its investigation without a decision or comment on the merits. The matters under review are to be consolidated into new proceedings which will examine specific rate levels. The general public must now wait indefinitely longer for the proper resolution of the issues now directly before the Commission.

I dissent to the Commission's action for three basic reasons.

First, determination of the appropriate ratemaking principles for the nation's telephone system is a matter of crucial importance

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calling for all the expertise and devotion of this Commission. The public interest is not served by now refusing to confront and resolve the difficult issues raised in this four-year-old proceeding.

Secondly, "expedition," the professed rationale of this decision, is an oft-professed but seldom achieved illusory goal of this agency. Unless the Commission intends to retire from the field of contention altogether, allowing Bell to price in any manner the company finds in its interest, these issues and their attendant differences will have to be resolved. The "agreement" limits none of these differences, nor does it limit any of the positions the parties may assert in future proceedings.

Third, the difficulties with the "agreement" illustrate that in fact there is no "agreement." Rather there is:

--a summary of the contending positions

--acknowledgment that any, all, or none of the viewpoints may or may not be relevant to any particular ratemaking process

--pious statements about firm deadlines and promised studies

--lack of any agreed upon common ground and

--clear promises of renewed battle wherever the Commission again raises the issue of ratemaking principles.

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History and Importance of the Investigation

In order to gain an understanding of what is at stake here it is necessary to review in part the events leading to the present Commission consideration. The majority notes:

A primary predicate of our initial Order of Investigation herein was the results of the fully distributed cost study made by Bell in the Domestic Telegraph Investigation, Docket 14650, which revealed a wide disparity in the levels of earnings among the various classes of interstate service. Majority opinion, para 6.

The principal reason for undertaking a formal investigation of the entire Bell system interstate and foreign services was the question of reasonable rate structure. As the Commission noted in the opening paragraph of its investigation order in 1965:

These levels of earnings, as well as the wide variations in such levels for the different classes of service, indicate the desirability of a thorough examination by the Commission of the interstate rate structure of the Bell System to determine the lawfulness of the rate levels and rate relationships within that structure. The importance of such a determination is underscored by the fact that certain of the services involved are furnished by the Bell System in direct competition with services offered by other carriers.

American Telephone & Telegraph Co., 2 F. C. C. 2d 871-72 (1965) (emphasis supplied).

The Commission's specification order in this Investigation noted:

In Phase 1, we shall consider the substantial questions raised by the seven-way cost study, which we found to warrant "a thorough examination by the Commission of the interstate rate structure of the Bell System to determine the lawfulness of the rate levels and rate relationships within that structure." (footnote omitted). These questions are of fundamental importance, clearly call for the sharp focus referred to in the above paragraph, and should be resolved as promptly as possible. American Telephone & Telegraph Co., 2 F. C. C. 2d 42-43 (1965) (emphasis supplied).

Thus, initially, the question of unlawful price discrimination and possible cross subsidization of services by ATT was to have been resolved first in the proceeding. The importance of the rate structure question was emphasized again in the denial of reconsideration when Bell opposed the whole idea of a formal investigation. American Telephone and Telegraph Co., 2 F. C. C. 2d 173, 174-75 (1965). Now, after four years, the resolution is to be deferred again.

It may be useful to describe precisely the environment of pricing under consideration. In 1968 the Bell interstate operations generated \$4.3 billion in revenues and \$785 million in net operating income. Between 80 and 85 percent of these interstate revenues were generated by the message toll telephone service (MTT). MTT is regular long-distance telephone service available and used by most consumers. Bell has a monopoly of this service-- consumers have no other choice. But between 15 and 20 percent of Bell's

interstate operation is in so-called private line type or teletypewriter exchange services--the provision of communications services to specialized users. These services go under a variety of names--private line, Telpak, program transmission, and TWX. The characteristic of each is that the user usually has a choice of more than one supplier and Bell faces at least potential if not actual competition. Thus, for example, a large business user, subject to license, could build his own communications system--or have one custom-made by a non-Bell carrier rather than buy from Bell. A potential user of Bell's TWX service could go to Western Union's Telex service instead. And a television network or a group of stations might contract with a non-Bell carrier under license for the provision of network program transmission service rather than pay Bell rates.

By the same token in other situations Bell might also find itself under heavy pressure to provide private line service to an important customer for reasons other than potential competition--perhaps to the Defense Department or NASA--at reduced rates. Or Bell might find a potential market which could be entered only with service at very low rates which were below costs.

Bell could find it in its best interest for many reasons to subsidize the rates for these services--to meet competition, to

enter new markets, or to satisfy powerful customers. To do so would keep these rates low, with Bell making up the "losses" at the expense of that customer who must buy telephone service from Bell--the MTT user.

If it were to follow such a course, Bell could keep out potential competitors, satisfy large users who would not have to pay the full cost of their use of communications service, and enter new markets with the attendant increase in rate base and absolute level of regulation-constrained profits.

At least these are some of the concerns which gave rise to this proceeding. And these concerns have been embodied in more than the common-sense description put forward here, and in the Commission's earlier statements. In one of the most famous articles on utility regulation, Harvey Averch and Leland Johnson laid out a rigorous exposition of the economic incentives of a firm under regulation. One incentive they describe is for the firm "to expand into other regulated markets, even if it operates at a (long run) loss in these markets; therefore, it may drive out other firms, or discourage their entry into these other markets, even though the competing firms may be lower cost producers." See H. Wein, "Fair Rate of Return and Incentives--Some General Considerations," in Trebing (ed.)

Performance Under Regulation 39, 42 (1968); and H. Averch and L. Johnson, "Behavior of the Firm Under Regulatory Constraint," 52 Am. Econ. Rev. 1052 (1962). Averch and Johnson used the communications industry as their example, focusing on the Private Line cases. [AT&T and Western Union Private Line Cases, 34 F. C. C. 217 (1963)] Among the conditions necessary for this type of behavior on the part of the regulated firm are the desire to pursue a level of profits and an actual rate of return greater than the firm's cost of capital. Recognizing the difficulty of satisfying theoretical conditions in the real world the following data is nevertheless of interest. Between 1959 and 1966 Bell never earned less than 7.5% and at times as much as 8.25%. In 1967 the Commission determined that Bell's cost of capital was between 7.0% and 7.5%. In 1968 Bell earned 7.6%. It is earning well in excess of 8.3% now. Thus, the Averch-Johnson conditions stand in strong probability of being fulfilled.

The importance the Commission once attached to the need for defining ratemaking principles in this area is clear. When undue discrimination takes place it is the user with no alternative who pays the subsidy--in the case of telephone service it would be the MTT (regular long-distance) user. What is also clear is that the Commission has repeatedly found Bell to have engaged in unlawful

discriminatory practices in providing specialized services. The story begins as early as the so-called Private Line cases and the Above 890 Mc/s decision (which allowed private microwave competition). Allocation of Microwave Frequencies Above 890 Mc., 27 F. C. C. 359 (1959).

--In the Private Line cases the Commission found that the rate structure was unlawful. AT&T and Western Union Private Line Cases, 34 F. C. C. 217 (1963). The regular long distance(MTT)user bore the cost of the discrimination.

--In the Telpak case the Commission found unlawful discrimination and ordered termination of certain offerings. Telpak, 37 F. C. C. 1111 (1964), aff'g 38 F. C. C. 370 (1964). The rates for others were increased later. Again the burden was borne by the small MTT user.

--In the Wide Area Data Service (WADS) case the Commission found the low rates not justified by cost savings. 35 F. C. C. 149 (1963). The service was terminated by Bell.

--In its Telegraph Report the Commission found that "the data disclosed that, for each period in which a cost study was requested by the Commission, the Bell System's earnings levels appeared to be deficient in areas where direct competition existed between Western Union and AT&T." Report of the Telephone and Telegraph Committees of the Federal Communications Commission in the Domestic Telegraph Investigation, Docket No. 14650 (1966) p. 207.

--In the Sports Network, Inc. case Bell has been found to have unlawfully discriminated in its provision of broadcast program transmission services in an Examiner's Initial Decision released January 30, 1968, FCC 68D-4 (1968). The Commission has taken no action to remedy this particular situation, but has deferred consideration despite the fact that there have

been concerns over the possible discriminatory nature of this service and its affect on broadcast policy since its inception in 1948. The Barrow Report on networks issued in 1958 noted:

"There is sufficient question with respect to the level of rates and the rate structure to warrant an early Commission determination of the docketed proceeding." Network Broadcasting H. R. 1297 85th Cong. 2d Sess. (1958) p. 546. Also see the Initial Decision in Dkt. No. 16043, Paragraphs 8-16 [FCC 68D-4 (1968)].

And in a paper presented to the Symposium on Regulatory Pricing Policies, Institute of Public Utilities, Michigan State University, East Lansing, Michigan (March 25, 1969), Commissioner Cox noted: "I might observe that to this day the Commission has still been unable to reach a decision as to whether or not these Telpak service classifications are compensatory and whether or not they are a burden on users of other services. Hopefully we will finally be able to reach a decision on this issue in the investigation of A. T. & T. that is now underway. But it must be emphasized that the Telpak discrimination has been in existence for over eight years and remains unjustified." (mimeo ed., pp. 17-18, emphasis supplied). In the light of this record, extending over 15 years, it seems clear to me that Commission action is long overdue if the interests of the general consumer are ever to be protected.

The Commission's dereliction in the past on matters of price discrimination, service cross-subsidization, and predatory pricing has had very serious implications for the public interest.

But continued failure would be even more serious.

The President's Communications Policy Task Force Final Report (1968) said the domestic telecommunication's common carrier was "in a state of creative ferment facing a host of new challenges and new opportunities." Chapter 6, p. 2. It recommended that, "Public policy should promote an environment assuring free and competitive opportunity . . . " Id at 6. The predatory effect of Bell's Telpak pricing on the development of non-Bell microwave systems has been established by past Commission decisions. But the potential private competition from CATV-broadband services, domestic satellites, data communication systems serving the computer industry, and non-Bell common carriers is great and growing. The potential benefits of such competition--innovation, new technology, improved service responsiveness--can only be evaluated if new entrants are given fair opportunity to prove their worth. This cannot occur if Bell is allow to use its present monopoly position to frustrate entry, or if the Commission refuses to provide the proper environment. In the words of the Presidential Task Force, "If non-compensatory pricing is to be guarded against, the FCC must establish effective regulatory standards over minimum rates." Id. at 19.

The Hope for Expedition

The majority now hopes to expedite a case that is four years old. The majority states: "[W]e believe that the procedures [here adopted] will enable us to reach these rate issues with greater dispatch and effectiveness than if further extended hearings were held in Docket 16258." Majority opinion, para. 9. Presumably expedition is always a desirable goal so long as the consideration of important substantive issues is not impaired. But for two basic reasons the majority will not achieve expedition by adopting this "agreement."

First, any specific rate case will necessarily require a determination of the appropriate mixture of ratemaking principles to be used in assessing the degree, if any, of past "burden" on other services, and the likelihood in the future of discriminatory burden. The important questions that should have been resolved in this proceeding are:

- (1) What indices will the Commission use to detect past and prospective cross-subsidization of one service by another?
- (2) What analysis and data must Bell provide to demonstrate that cross-subsidization and predatory pricing will not take place?
- (3) What principles should be followed in pricing the basic MTT service?

The specific rates in question must then be measured against these ratemaking standards. The majority's incorporation of the entire record of ratemaking in this proceeding into the next one, Docket Number 18128, is more than a procedural or ministerial act. More than docket numbers are changed. In fact, it is a recognition that all the issues raised in this proceeding must be resolved before satisfactory determinations can be made on specific rate questions for specific services. The present proceeding has had specific rate questions associated with it for the entire time that ratemaking principles were considered--these were the residuals of TWX rate proceeding (Docket Number 15011) and the Telpak proceeding (now Docket Number 18128). Tossing in specific rate matters does not help in determining appropriate ratemaking principles--the Commission has had these questions before it all along. In addition, the present proceedings have included testimony directed at cost analysis of specific rates and services.

Thus, for fifteen years the Commission has been trying to evaluate charges of unlawful price discrimination, service cross-subsidization, and predatory pricing; during that time it essentially has been flying blind in terms of any overall analysis of the questions of price discrimination and the appropriate ratemaking

principles; the Telegraph Inquiry at least suggested that an entire company's (Western Union) economic viability might be threatened by the effects of price discrimination; and a proceeding (this one) was begun to deal with the overall question. The Commission admits it cannot decide now.

The second reason that the "expedition" argument is illusory is that expedition is clearly compatible with rejection or modification of this agreement. There has been talk that without this agreement a decision on ratemaking principles is more than a year away. This is nonsense. The Commission does not need to accede to every procedural delaying tactic thrust upon it. The record is already extensive in this case. The arguments have been made. Little will be added by further proceedings. And procedural fairness can be discharged by specifying precise amounts of time for each remaining stage (testimony and cross-examination) of the proceeding. It is now the end of July. An equitable time schedule, perhaps with some extended sessions, could result in a closed record by the middle of September. One month could be given for submitting briefs and reply briefs. The case could be argued in October and a decision issued by the middle of December. Thus the parties could have the decision on hand to begin the specific rate proceeding (Docket Number 18128) with the studies and rate adjustments now due to be filed by late fall.

Even if there were a month slippage, little would be lost. The important consideration is that the Commission and the parties would have some overall guidelines for inspection of specific rates-- guidelines that are a sine qua non of effective regulation. Bell could be fairly on notice as to what precise information would be required for justifying its pricing proposals.

The Commission is deluding itself if it believes by turning to specific rate matters it can avoid difficult decisions or questions of proper theoretical principles and overall policy guidelines. And if further formal and informal proceedings lead to continued disagreement, the Commission may spend twice as long getting to any resolution of the issues. It is folly to believe that "implementing studies called for by the statement, and any related rate adjustments based thereon, can be filed by October 1, 1969." Bell has had since January 1968 to study and revise its program transmission tariff and it will not surprise anyone if the Commission finds itself in tariff hearings on all adjustments anticipated by the "agreement." Studies by Bell cannot always be relied on to provide the definitive answers to questions of unlawful discrimination and proper rate structure.

The "Agreement" is Meaningless

In a somewhat extended use of understatement, paragraph 3 of the procedures outlined after paragraph 18 of the agreement notes: "[T]he agreed ratemaking principles and factors herein contained are, of necessity, rather general and non-exclusive," (emphasis supplied). One wonders what has been agreed to, except to agree to disagree. The positions of the parties are summarized, and none are barred from asserting their present positions on others. ("Agreement," paragraphs 6-15 and fn. 8, as well as para. 1 of the procedures section.) Statements of evaluation of the positions advanced are often tautological--e.g., "It is not intended that any one of the principles be given undue weight. It is recognized that the regulatory process involves a proper balancing. . . ." ("Agreement," para. 3); and again "The rate level for any single class of service and the ultimate rates must meet the statutory requirements that they be reasonable and not unduly discriminatory or preferential" ("Agreement," para. 17). In other instances the principle and technique is simply enunciated with the note that it may be useful, without any indication as to when it is useful. See "Agreement" paragraphs 8, 10, 14, 15. In sum there is no "agreement"; it is

just that some way had to be found to terminate this proceeding.¹

¹If the Commission were really serious about questions of price discrimination it might consider whether there are instances where price discrimination would be socially beneficial to the nation. It has given limited consideration to this question in its consideration of preferential interconnection rates for educational broadcasting. The question is also before the Commission in the press wire case (Docket Number 15094). Internal indirect subsidies are never viewed with much enthusiasm. But it is conceivable that public interest considerations might find them justified. (And any pricing scheme by a communications common carrier is filled with instances where rates are not strictly cost related, for obvious reasons.) A few examples might include lower than ordinarily justifiable rates for the poor, for very remote areas (note the REA telephone program), and for some educational purposes.

There has recently been much consideration given to the fact that Hawaii and Alaska cannot get regular live television service; and that it costs more to call the States of Hawaii or Alaska from the nation's capital than it does to place a call to the United Kingdom. Obviously one social goal is to have the people in all our states tied together by the nation's communications system. For Alaska and Hawaii costs are a substantial barrier to this goal.

One extreme proposal would be to make long distance calls (and television) free to these states, in part as a remedial measure. But the proposal is not so extreme when one considers that under the following circumstances a long distance call is free anywhere in the country, at least in a direct charge sense.

--a long distance information call

--a long distance station-to-station call when there is no answer

--a long distance call (including inward WATS) where the number is busy

--a long distance person-to-person call when the person called is not there, or there is no answer

--a long distance reverse charges call which is not accepted

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There are numerous ways in which the agreement could be improved. These would include the following:

--The Commission should recognize some of the basic concerns in communications price discrimination: that ratemaking principles for MTT by itself must be properly and rationally applied; and that Bell's other pricing policies must not be predatory in relationship to actual or potential competition.

--The MTT service should not be viewed as the catchall residual where consumers are required to pay off all past mistakes of Bell in its supply ventures for it and other services; MTT should be priced by itself without reference to the need to augment revenues in other services.

--In evaluating present or proposed new services other than MTT, Bell must bear the burden of demonstrating prior to the time tariffs go into effect that these services will not burden MTT and that future losses will be borne by someone other than MTT consumers, presumably Bell stockholders. In meeting this requirement of insuring that MTT consumers are not burdened, Bell should provide adequate data and analysis of the type specified in paragraphs 7-15 of the "agreement." In addition the Commission should clearly be in a position to make its own evaluation of the data and analysis provided.

(Footnote continued)

All these uses of communication facilities are subsidized, albeit by all long distance callers as a class. In view of these subsidies, consideration might be given to making charges to and from Alaska or Hawaii no greater than the greatest charge for a contiguous U.S. call. Thus the charge to and from Washington, D. C. might be no higher than the highest charge from Washington to any place in the contiguous U.S. This would be discrimination and subsidy at least with an identifiable social goal--rather than discrimination begun to protect or extend a monopolist's market position.

--The Commission should begin examination now of the MTT tariff to determine whether all beneficial price adjustments have been exhausted (e.g., off-peak promotional rates v. peak penalty rates), and to determine the proper rate levels and structure for MTT standing alone.

Four years after the beginning of the Commission's heralded investigation of Bell's interstate and foreign communications service, it is useful to look back and see what has been accomplished.

--Rate of Return.

In July 1967 the Commission ruled that Bell's overall earnings should be between 7-7.5% and a rate reduction was ordered nominally designed to achieve that result. In fact, in 1968 Bell earned 7.6%, an overcharge of at least \$10 million, and in 1969 is earning at a rate better than 8.3%. The Commission will not even begin reexamination of the present rates under rate of return until September 1969.

--Separations.

In July 1967 the Commission ordered the adoption of certain separations procedures. It reconsidered this determination, ordered separate rulemaking and finally in January 1969 adopted procedures less wise than otherwise might have been. See Jurisdictional Separations of Telephone Companies, 16 F. C. C. 2d 311, 335 (1969).

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Commissioner Cox in his pricing policy paper of March 1969 described the need for action in this proceeding: "We expect the thorough and far-reaching investigation into the ratemaking principles and factors that will be used by the Commission for evaluating carrier pricing proposals will evolve a set of workable, implementable rate-making standards. These standards will establish a framework of analysis that should facilitate problems of information gathering, carrier justifications, and commission examinations in such a manner that the regulatory process will be expedited and the quality of commission decisions will be improved." Now on ratemaking principles and price discrimination--questions central to this investigation--the Commission decides after four years no decision can be made now. These actions call into sharp question the capability of this agency to engage in public utility regulation at all. I dissent.

NEWS

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Report No. 3789 NONBROADCAST AND GENERAL ACTION* September 19, 1969 - G

FCC REPLY TO NEW YORK CITY COMMISSIONER OF CONSUMER AFFAIRS ON TELEPHONE RATE DISCUSSIONS

FCC Chairman Rosel H. Hyde has sent the following letter to Mrs. Bess Myerson Grant, Commissioner of the New York City Department of Consumer Affairs, in response to a letter from Mrs. Grant about discussions between the FCC and the American Telephone and Telegraph Company on interstate rates and earnings.

This is in reply to your letter of September 9, 1969, making further reference to the discussions between the Commission and the American Telephone and Telegraph Company regarding the level of rates and earnings of the Bell System for interstate services. You again urge that before any action is taken in the matter that your department and other consumer groups be afforded an opportunity to cross-examine telephone company representatives and to call witnesses in opposition to the company's intentions.

As explained in the Commission's previous letter to you, the current proceedings are essentially a continuation of a regulatory process the Commission has effectively used over the years to bring about substantial reductions in interstate long distance rates. The instant discussions are being conducted in a similar fashion, but with some added features intended to make the discussions even more effective. Thus, the discussions are now being conducted within the framework of principles and standards established by our decision in 1967 in Docket No. 16258 which, as you may recall, was one of the most comprehensive formal investigations and hearings ever conducted with respect to AT&T's interstate rates and revenue requirements. The current discussions, which are being guided by those principles and standards, have as their principal purpose the determination of whether developments which have occurred since the decision in Docket No. 16258 warrant any different answer to the question of what is an appropriate allowable level of interstate earnings for the Bell System.

(over)

* Not part of record certified by Commission.

In addition to regular members of the Commission's staff who are examining the claims and contentions of the company in detail, we have, experimentally, assigned two members of the staff to act in the special role of advocates solely on behalf of the consumer's interest in contrast with the other members of the staff whose activities in this case have properly been concerned not only with legitimate interests of the consumers, but also with the reasonable financial requirements of the carrier to do the job required of it by law as a public utility. The Commission has also retained the services of several outside consultants to give us their expert advice and evaluation of the issues and evidence. Finally, and contrary to the implications of secrecy of your letter, the entire record of this proceeding is being transcribed and such transcriptions are available on an overnight basis to interested persons and members of the press.

The full Commission has devoted thus far a total of four full working days to these discussions and examination and it is anticipated that several more full working days will be required before we can take the matter under advisement.

In light of all of the foregoing we are satisfied that the procedures we have been following fully serve the interest of the public in fair and reasonable rates; and that these procedures, as in the past, can be relied upon to assure the effectuation of prompt and appropriate rate adjustments as may be warranted in the circumstances. We see no reason to make any further changes in these procedures or to broaden the scope of participation therein. Moreover, as you have already been advised, the validity of these procedures has been upheld upon judicial review. Finally, if, as a result of these discussions, AT&T files any revised schedules providing for rate reductions (the company has stated it seeks no rate increases) for interstate telephone services, these schedules will be subject to inspection, comment or formal objection by any interested entity including your office. Any comments or objections will be considered by the Commission before the revised schedules are permitted to become effective and if substantial questions are raised, the Commission can set the matter for formal hearing.

If you have any further questions concerning these matters, the Commission or its representatives will be glad to discuss them with you.

This letter was adopted by the Commission on September 17, 1969.

Commissioner Johnson dissented.

BY DIRECTION OF THE COMMISSION

September 29, 1969

FULLY DISTRIBUTED EMBEDDED COST STUDY
FOR BELL SYSTEM INTERSTATE SERVICES -
ANNUALIZED AS OF LATE 1967 (REVISED)

On May 20, 1968, A.T.&T. submitted the results of a fully distributed cost study for all of the Bell System's interstate services (the "nine-way cost study") identified as F.C.C. Staff Exhibit 48 in Docket No. 16258. Subsequently, review of this study was undertaken, and the revised results are attached to this memorandum.

As in the initial nine-way cost study, there has been a full distribution of total embedded investment, expenses, and taxes among the various categories of interstate services as of the latter part of 1967, and the cost and revenue data have been placed on an annualized basis. The results shown in the initial nine-way study have been adjusted for the effect of changes in separations procedures, changes in settlement arrangements, and new rate filings and proposals, as described below:

1. The revised study results reflect the effect of the changes in the procedures for separating investment, expenses and revenues between interstate and intrastate operations adopted in Docket No. 17975, effective January 1, 1969. (The initial nine-way cost study results had been based on the separations proposal submitted by the Bell System in Docket No. 17975.)

2. The revised study results reflect the effect of the interstate settlement arrangements with independent telephone companies currently in effect. (The initial nine-way cost study had been based on interim settlement arrangements.)

3. The revised study results reflect the effect on revenues of (a) the rate changes for message toll telephone which became effective on August 1, 1968, (b) the rate changes for the television program transmission service to become effective on October 2, 1969, and (c) the rate changes for TWX, Telpak, and audio program transmission services with an effective date of November 1, 1969.

4. The revised study results reflect the effect of revenue adjustments for illustrative message toll telephone and WATS rate schedules.

With respect to the program transmission services, it should be noted that this revised study shows allocations based on the audio and video service classifications that were in effect in 1967. It does not reflect the revised classifications of television service (combining audio and video service) and audio (radio) service, as established in the tariff filings for the program transmission services. Data were not available from the 1967 study to allocate the amounts of investment, expenses, taxes and revenues included

in the audio service category between audio in connection with television service and audio (radio) service.

The results of this revised nine-way cost study are shown for the four allocation methods used in the initial nine-way cost study. The four methods were generally described in the memorandum accompanying the initial study, dated May 20, 1968, and more detailed descriptions of the methods have been submitted to the F.C.C. Staff and other interested persons. This revised study, however, does include a modification of the four methods with respect to the allocation of the depreciation reserve. In all methods used in this study the total interstate depreciation reserve has been redistributed to the service categories on the basis of an analysis of the age of the various types of plant allocated to the various services.

This revised nine-way cost study also shows results obtained for two additional allocation methods, which have been designed as approaches to the determination of costs on a historical cost-responsibility basis. Method 5 is similar in concept to Method 3 of the initial nine-way study, except that the effect of length-of-haul (mileage band) characteristics has been reflected and additional refinements were made on the basis of supplementary data on Associated Company (as well as Long Lines) plant. Method 6 is a refinement of Method 4 of the initial nine-way study.

In Method 6 the line haul costs of the coaxial and radio circuits for the private line, TWX, and program services (as such facilities were allocated to the services under the Method 4 procedures) have been determined on the basis of an analysis of capacity costs of coaxial and radio systems. The purpose of Method 6 is to estimate the embedded costs of the additional plant that had been constructed to serve the additional facility requirements imposed as a result of providing these private line, program transmission and TWX services.

Attachment A is a summary sheet which presents the ratios of net operating earnings to net investment under the six allocation methods. Following this summary sheet are schedules (Attachments B through G) presenting the results separately under Methods 1 through 6 in the form of an earnings statement, an investment statement, and a summary of expenses, income charges and operating taxes.

FULLY DISTRIBUTED EMBEDDED COST STUDY
Bell System Interstate Services
Annualized as of late 1967*

(Revised)

Summary of Ratios of Net Operating
Earnings to Net Investment
Under Various Allocation Methods

Category	Method 1	Method 2	Method 3	Method 4	Method 5	Method 6
Message toll telephone ^{1/}	8.0%	7.3%	6.5%	7.1%	6.9%	6.8%
Wide area telephone service ^{1/}	11.9	16.1	14.9	15.9	15.5	15.3
Teletypewriter exchange service ^{2/}	8.1	8.7	12.3	9.0	9.2	9.2
Telephone grade private line services	4.3	5.4	8.5	5.6	6.0	5.9
Telegraph grade private line services ^{3/}	6.7	8.3	9.0	8.4	8.5	8.4
Telpak ^{4/}	5.2	6.3	10.2	7.2	8.9	9.0
Audio ^{5/}	5.3	7.0	10.8	7.5	7.5	7.8
Video ^{6/}	4.2	5.2	5.2	5.2	5.2	8.4
Other	11.7	8.9	9.3	8.9	8.5	9.3
Total	7.5%	7.5%	7.5%	7.5%	7.5%	7.5%

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* The study results reflect the level of revenues and expenses annualized as of the latter part of 1967, together with the effect of separations changes adopted in Docket No. 17975; independent company settlement arrangements currently in effect; TWX, Telpak, Audio and Video rate changes; and offsetting MTT and WATS revenue adjustments. (See accompanying memorandum.)

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Attachment A
Page 2 of 2

Attachment A
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NOTES

- 1/ If the ratios for MTT and WATS were computed without the effect of revenue adjustments offsetting rate changes for other categories, the results would be for MTT -- Method 1: 8.7%; Method 2: 8.0%; Method 3: 7.2%; Method 4: 7.8%; Method 5: 7.5%; Method 6: 7.4%; and for WATS -- Method 1: 12.4%; Method 2: 16.8%; Method 3: 15.5%; Method 4: 16.5%; Method 5: 16.1%; Method 6: 15.9%.
- 2/ If the ratios for the TWX service were computed without the effect of the rate changes for this service, the results would be -- Method 1: 6.4%; Method 2: 6.9%; Method 3: 10.0%; Method 4: 7.1%; Method 5: 7.4%; Method 6: 7.3%.
- 3/ The ratios for the private line telegraph grade service category shown above are based on the rates for such services containing the press exception.
- 4/ If the ratios for Telpak were computed on the basis of the interim rates that became effective 9-1-68, the results would be -- Method 1: 2.1%; Method 2: 3.1%; Method 3: 6.0%; Method 4: 3.8%; Method 5: 5.0%; Method 6: 5.1%.
- 5/ If the ratios for the audio service were computed without the effect of the rate changes for this service, the results would be -- Method 1: 2.1%; Method 2: 3.6%; Method 3: 6.3%; Method 4: 3.9%; Method 5: 4.0%; Method 6: 4.2%.
- 6/ If the ratios for the video service were computed without the effect of the rate changes for this service, the results would be -- Method 1: 0.7%; Method 2: 1.4%; Method 3: 1.4%; Method 4: 1.4%; Method 5: 1.4%; Method 6: 3.7%.

Method 1

FULLY DISTRIBUTED INCURRED COST STUDY

Bell System Interstate Services

Annualized as of late 1967

(Revised)

EARNINGS STATEMENT

SUMMARY

(Thousands of Dollars)

	<u>Message Toll Telephones*</u>	<u>Wide Area Telephones Services*</u>	<u>Teletypewriter Exchange Services*</u>	<u>Telephone Grade Private Line Services</u>	<u>Telegraph Grade Private Line Services</u>	<u>Telpak</u>	<u>Audio</u>	<u>Video</u>	<u>Other</u>	<u>Total</u>
<u>Revenues and Other Income</u>										
Operating Revenues	2,827,800	228,800	62,000	160,500	109,600	279,800	25,100	64,200	41,200	3,798,900
Other Income	17,600	1,400	300	3,400	400	3,800	300	900	400	28,700
Total	2,845,400	230,200	62,300	163,900	110,000	283,600	25,300	65,100	41,600	3,827,600
<u>Expenses, Income Charges and Operating Taxes</u>										
Expenses, Income Charges and Operating Taxes except Federal Income Taxes	1,968,000	114,600	41,600	124,200	87,600	193,400	19,300	50,500	16,900	2,618,100
Federal Income Taxes	364,700	50,700	8,700	12,700	9,100	32,500	2,200	4,800	10,800	496,200
Total	2,332,700	165,300	50,300	136,900	96,700	227,900	21,500	55,300	27,700	3,114,300
<u>Net Operating Earnings</u>	512,700	64,900	12,000	27,000	13,400	55,800	3,800	9,800	14,000	713,400
<u>Net Investment</u>	6,421,500	945,800	149,100	632,600	198,500	1,072,500	72,000	235,800	119,600	9,451,900
<u>Ratio of Net Operating Earnings to Net Investment</u>	8.0%	11.9%	8.1%	4.3%	6.7%	5.2%	5.3%	4.2%	11.7%	7.5%

NOTE: The study results reflect the level of revenues and expenses annualized as of the latter part of 1967, together with the effect of separations changes adopted in Doctet No. 17775, independent company settlement arrangements currently in effect; TUI, Telpak, Audio and Video rate changes; and offsetting MTT and WATS revenue adjustments. (See accompanying memoranda.)

*Based on "Busy Hour" Apportionments.

Method 1

FULLY DISTRIBUTED ENDED COST STUDY

Annualized as of late 1967

(Revised)

INVESTMENT STATEMENT
SUMMARY

(Thousands of Dollars)

255

<u>Telephone Plant and Other Investments</u>										
Telephone Plant in Service	7,816,100	653,000	192,800	728,000	309,600	1,289,800	92,300	289,400	134,600	11,505,400
Telephone Plant Under Construction	370,100	29,700	6,800	72,400	8,700	80,900	5,600	20,000	8,800	602,900
Other Investments	30,100	2,400	700	2,800	1,000	4,800	400	1,100	700	43,900
<u>Total Gross Investment</u>	8,216,300	685,000	200,300	803,100	319,300	1,375,500	98,300	310,400	144,000	12,152,100
<u>Depreciation Reserve</u>	1,794,800	139,200	51,100	170,500	120,800	303,000	26,300	74,600	24,400	2,700,200
<u>Net Investment</u>	6,421,500	545,800	149,100	632,600	198,500	1,072,500	72,000	235,800	119,600	9,451,900

*Based on "Busy Hour" Apportionments.

Method 1

FULLY DISTRIBUTED EMBEDDED COST STUDY

Bell System Interstate Services

Annualized as of late 1967

(Revised)

EXPENSES, INCOME CHARGES AND OPERATING TAXES

SUMMARY

(Thousands of Dollars)

Expenses	Message Toll Telephones*	Wide Area Telephone Services*	Teletypewriter Exchange Services*	Telephone		Telegraph Grade Private Line Services	Telpak	Audio	Video	Other	Total
				Grade	Private						
Traffic, Commercial and Revenue Accounting Expenses	659,300	13,600	6,100	13,900		8,000	12,600	1,900	3,700	500	71,300
Maintenance Expenses	436,200	37,800	13,500	43,100		38,100	69,300	8,300	18,600	4,900	169,700
Depreciation Expense	356,800	30,500	11,800	32,200		22,700	53,300	3,700	14,000	5,000	93,000
General Expenses	108,800	5,700	2,000	6,500		4,000	10,300	1,100	2,600	800	14,900
Operating Rents	36,700	2,000	500	3,000		700	6,100	400	1,500	1,300	9,200
Relief and Pensions	122,000	5,000	1,900	5,700		4,400	8,400	1,100	2,300	500	15,300
General Department Services	41,500	3,400	1,100	4,000		1,800	7,400	500	1,500	800	10,200
Total	1,761,600	98,000	36,900	108,400		79,800	167,400	17,100	44,200	13,700	2,227,100
Operating Taxes											
Federal Income Taxes	364,700	50,700	8,700	12,700		9,100	32,500	2,200	4,800	10,800	46,200
Other Taxes	203,600	16,400	4,600	15,700		7,700	27,700	2,200	6,200	3,200	38,300
Total	568,300	67,200	13,300	28,400		16,800	60,200	4,400	11,000	14,000	74,500
Income Charges	2,800	100	100	200		100	300		100		3,500
Total Expenses, Income Charges and Operating Taxes	2,332,700	165,300	50,300	136,900		96,700	227,900	21,500	55,300	27,700	3,114,300

*Based on "Busy Hour" Apportionments.

Method 2
FULLY DISTRIBUTED EMBEDDED COST STUDY
Bell System Interstate Services
Annualized as of late 1967

(Revised)

EARNINGS STATEMENT
SUMMARY

(Thousands of Dollars)

	Message Toll Telephone*	Wide Area Telephone Service*	Teletypewriter Exchange Service*	Telephone Grade Private Line Services	Telegraph Grade Private Line Services	Telpak	Audio	Video	Other	Total
<u>Revenues and Other Income</u>										
Operating Revenues	2,825,600	236,200	62,100	160,800	109,800	280,200	25,100	64,300	32,800	3,798,900
Other Income	22,900	2,400	-	1,400	500	1,300	-	100	-	28,700
Total	2,848,500	240,600	62,100	162,100	110,300	281,700	25,100	64,400	32,800	3,827,600
<u>Expenses, Income Charges and Operating Taxes</u>										
Expenses, Income Charges and Operating Taxes except Federal Income Taxes	2,035,300	97,400	40,500	111,200	81,800	173,300	17,200	46,000	15,400	2,618,100
Federal Income Taxes	329,900	63,900	9,300	19,400	12,000	43,700	3,300	7,100	7,900	496,200
Total	2,365,200	161,400	49,800	130,600	93,800	217,000	20,500	53,200	22,900	3,114,300
<u>Net Operating Earnings</u>	483,300	79,200	12,300	31,500	16,600	64,700	4,600	11,200	9,900	713,400
<u>Net Investment</u>	6,617,700	490,800	142,000	586,300	198,400	1,023,400	66,000	216,300	111,200	9,451,900
<u>Ratio of Net Operating Earnings to Net Investment</u>	7.3%	16.1%	8.7%	5.4%	8.3%	6.3%	7.0%	5.2%	8.9%	7.5%

NOTE: The study results reflect the level of revenues and expenses annualized as of the latter part of 1967, together with the effect of separations changes adopted in Racket No. 17975, independent company settlement arrangements currently in effect; TWX, Telpak, Audio and Video rate changes; and offsetting MTT and WATS revenue adjustments. (See accompanying memorandum.)

based on "Busy Hour" Apportionments.

Method 2

FULLY DISTRIBUTED EMBEDDED COST STUDY

Bell System Interstate Services

Annualized as of late 1967

(Revised)

INVESTMENT STATEMENT
SUMMARY

(Thousands of Dollars)

	Message Toll Telephones*	Wide Area Telephone Services*	Teletypewriter Exchange Services*	Telephone Grade Private Line Services	Telegraph Grade Private Line Services	Telpak	Audio	Video	Other	Total
Telephone Plant and Other Investments										
Telephone Plant in Service	7,918,400	562,900	192,400	724,000	307,700	1,285,500	91,700	288,300	124,400	11,405,400
Telephone Plant Under Construction	481,500	49,500	-	29,200	10,200	30,900	-	1,300	400	602,900
Other Investments	30,500	2,100	700	2,700	1,000	4,800	400	1,100	700	43,900
Total Gross Investment	8,430,400	614,500	193,100	756,000	318,900	1,321,200	92,100	290,700	135,500	12,152,100
Depreciation Reserve	1,812,700	123,700	51,100	169,700	120,400	297,800	26,100	74,400	24,300	2,700,500
Net Investment	6,617,700	490,800	142,000	586,300	198,400	1,023,400	66,000	216,300	111,200	9,451,600

*Based on "Busy Hour" Apportionments.

September 1969
Attachment C
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Method 2

FULLY DISTRIBUTED ENDED COST STUDY

Bell System Interstate Services

Annualized as of late 1967

(Revised)

EXPENSES, INCOME CHARGES AND OPERATING TAXES

SUMMARY

(Thousands of Dollars)

Expenses	Message Toll Telephone*	Wide Area Telephone Services*	Teletypewriter Exchange Services*	Telephones		Telegraph		Tollpak	Audio	Video	Other	Total
				Grade Line Services	Private Line Services	Grade Line Services	Private Line Services					
Trunk, Commercial and Revenue Accounting Expenses	684,200	11,400	5,400	6,200	4,200			5,300	800	1,700	700	719,900
Maintenance Expenses	445,400	32,400	13,700	43,000	37,000			66,600	7,900	18,400	4,700	669,700
Depreciation Expense	362,800	24,800	11,700	32,000	22,600			53,200	3,700	14,000	5,000	530,000
General Expenses	116,300	4,000	1,700	4,900	3,600			6,800	900	1,900	400	141,900
Operating Rents	42,000	1,600	600	2,300	1,100			3,200	300	800	600	52,200
Relief and Pensions	125,900	4,200	1,800	4,800	3,900			7,200	1,000	2,000	500	151,300
General Department Services	48,900	3,500	800	2,500	1,600			3,100	400	900	500	62,100
Total	1,827,600	81,900	35,800	95,400	74,100			145,300	15,000	39,700	12,300	2,327,100
Operating Taxes												
Federal Income Taxes	329,900	63,900	9,300	19,400	12,000			43,700	3,300	7,100	7,500	496,200
Other Taxes	204,700	15,400	4,600	15,700	7,600			27,800	2,200	6,200	3,000	287,300
Total	534,600	79,300	13,900	35,100	19,600			71,500	5,500	13,400	10,500	783,500
Income Charges	3,100	100	-	100	100			200	-	-	-	3,700
Total Expenses, Income Charges and Operating Taxes	2,365,300	161,480	49,800	130,600	93,800			217,000	20,500	53,200	22,900	3,114,300

*Based on "Busy Hour" Apportionments.

Method 3

FULLY DISTRIBUTED FIXED COST STUDY

Bell System Interstate Services

Annualized as of late 1967

(Revised)

EXPENSES, INCOME CHARGES AND OPERATING TAXES

SUMMARY

(Thousands of dollars)

	Message Toll Telephone ^a	Wide Area Telephone Service ^a	Teletypewriter Exchange Service ^a	Telephone Grade Private Line Service ^a	Telegraph Grade Private Line Service ^a
--	---	--	--	--	--

Revenues and Other Income

Operating Revenues

Other Income

Total

Expenses, Income Charges

and Operating Taxes

Expenses, Income Charges

and Operating Taxes

except Federal Income

Taxes

Federal Income Taxes

Total

Net Operating Earnings

Net Investment

Ratio of Net Operating

Earnings to Net

Investment

260

3,008,000

28,000

3,036,000

32,800

-

32,800

64,000

100

64,100

25,100

-

25,100

280,100

1,500

281,600

109,800

500

110,300

160,700

1,400

162,100

62,100

-

62,100

238,300

2,400

240,600

2,925,700

22,900

2,948,600

2,038,900

301,300

2,340,200

458,500

7,007,700

6.5%

14.9%

12.3%

8.5%

9.0%

10.2%

15,300

4,300

19,600

46,000

7,100

53,100

201,200

80,400

281,600

139,700

61,600

201,300

80,700

12,500

93,200

94,900

28,200

123,100

36,000

11,200

47,200

101,200

61,900

163,100

2,038,900

301,300

2,340,200

458,500

7,007,700

2,038,900

301,300

2,340,200

458,500

7,007,700

6.5%

14.9%

12.3%

8.5%

9.0%

10.2%

15,300

4,300

19,600

46,000

7,100

53,100

201,200

80,400

281,600

139,700

61,600

201,300

80,700

12,500

93,200

94,900

28,200

123,100

36,000

11,200

47,200

101,200

61,900

163,100

2,038,900

301,300

2,340,200

458,500

7,007,700

2,038,900

301,300

2,340,200

458,500

7,007,700

6.5%

14.9%

12.3%

8.5%

9.0%

10.2%

15,300

4,300

19,600

46,000

7,100

53,100

201,200

80,400

281,600

139,700

61,600

201,300

80,700

12,500

93,200

94,900

28,200

123,100

36,000

11,200

47,200

101,200

61,900

163,100

2,038,900

301,300

2,340,200

458,500

7,007,700

2,038,900

301,300

2,340,200

458,500

7,007,700

6.5%

14.9%

12.3%

8.5%

9.0%

10.2%

NOTE: The study results reflect the level of revenues and expenses annualized as of the latter part of 1967, together with the effect of separations changes adopted in Docket No. 17975, independent company settlement arrangements currently in effect; TWX, Telpak, Audio and Video rate change; and offsetting MTT and WATS revenue adjustments. (See accompanying memoranda.)

^aBased on "Busy Hour" Apportionments.

Method 3

FULLY DISTRIBUTED EXPANDED COST STUDY

Bell System Interstate Services

Annualized as of late 1967

(Revised)

EXPENSES, INCOME CHARGES AND OPERATING TAXES

SUMMARY

(Thousands of Dollars)

	Message Toll Telephone	Wide Area Telephone Service	Teletypewriter Exchange Service	Telephone Grade Private Line Service	Telegraph Grade Private Line Service	Telook	Audio	Video	Other	Total
Telephone Plant and Other Investments	8,370,400	614,500	148,400	525,800	294,700	872,100	68,200	288,200	123,100	11,505,400
Telephone Plant in Service	481,500	49,500	-	29,200	10,200	30,900	-	1,300	400	602,900
Telephone Plant Under Construction	32,800	2,300	500	2,100	1,000	3,300	300	1,100	600	43,900
Other Investments	9,084,600	666,200	148,900	557,100	305,800	906,300	68,400	290,500	124,100	12,152,100
Total Gross Investment	2,076,900	146,100	35,100	100,600	116,000	120,800	17,700	74,100	12,900	2,700,200
Accumulation Reserve	7,007,700	520,100	113,800	456,500	189,800	785,500	50,700	216,400	111,200	9,451,900
Total Investment										

*Based on "Busy Hour" Apportionments.

Method 3

FULLY DISTRIBUTED EMBEDDED COST STUDY

Bell System Interstate Services

Annualized as of late 1967

(Revised)

EXPENSES, INCOME CHARGES AND OPERATING TAXES

SUMMARY

(Thousands of Dollars)

	Message Toll Telephone	Wide Area Telephone Services	Teletypewriter Exchange Services	Telephone Grade Private Line Services	Telegraph Grade Private Line Services	Telex	Audio	Video	Other	Total
Expenses										
Traffic, Commercial and Revenue Accounting Expenses	684,200	11,400	5,400	6,200	4,200	5,300	800	1,700	700	713,900
Maintenance Expenses	462,000	33,500	12,600	38,000	36,700	56,300	7,400	18,400	4,400	663,700
Depreciation Expense	385,400	26,500	10,200	25,200	22,200	38,900	2,900	14,000	4,600	530,000
General Expenses	119,700	4,100	1,600	4,100	3,600	5,900	900	1,900	400	141,800
Operating Rents	43,300	1,700	500	1,900	1,100	2,400	200	800	600	52,200
Relief and Pensions	127,400	4,300	1,700	4,400	3,800	6,300	900	2,000	400	151,300
General Department Services	48,900	3,500	800	2,500	1,600	3,100	400	900	500	62,100
Total	1,871,000	84,900	32,900	82,200	73,200	118,100	13,500	39,700	11,700	2,327,100
Operating Taxes	301,300	61,900	11,200	28,200	12,500	61,600	4,300	7,100	8,000	496,200
Federal Income Taxes	214,800	16,200	4,000	12,600	7,400	21,400	1,800	6,200	2,800	287,300
Other Taxes	516,100	78,100	15,200	40,800	19,900	83,000	6,100	13,300	10,800	783,500
Total	3,100	100	-	100	100	200	-	-	-	3,700
Income Charges										
Total Expenses, Income Charges and Operating Taxes	2,390,200	163,100	48,100	123,100	93,300	201,200	19,600	53,200	22,400	3,114,300

*Based on "Busy Hour" Apportionments.

Method 4
FULLY DISTRIBUTED EMBEDDED COST STUDY
Bell System Interstate Services
Annualized as of late 1967
(Revised)

EARNINGS STATEMENT

SUMMARY

(Thousands of Dollars)

	Message Toll Telephone*	Wide Area Telephone Service*	Teletypewriter Exchange Service*	Telephone Grade Private Line Services	Telegraph Grade Private Line Services	Telpak	Audio	Video	Other	Total
Revenues and Other Income										
Operating Revenues	2,825,600	238,300	62,100	160,800	109,800	280,200	25,100	64,300	32,800	3,798,900
Other Income	22,900	2,400	-	1,400	500	1,500	-	100	-	28,700
Total	2,848,600	240,600	62,100	162,100	110,300	281,700	25,100	64,400	32,800	3,827,600
Expenses, Income Charges and Operating Taxes										
Expenses, Income Charges and Operating Taxes except Federal Income Taxes	2,046,900	98,300	40,100	109,700	81,700	163,300	16,900	46,000	15,300	2,618,100
Federal Income Taxes	323,800	63,500	9,500	20,200	12,000	49,000	3,500	7,100	7,500	496,200
Total	2,370,700	161,800	49,600	129,900	93,700	212,200	20,400	53,200	22,900	3,114,300
Net Operating Earnings	477,900	78,800	12,500	32,200	16,600	69,400	4,700	11,200	9,900	713,400
Net Investment	6,692,700	496,700	139,200	575,600	197,300	959,100	63,700	215,900	111,700	9,451,900
Ratio of Net Operating Earnings to Net Investment	7.1%	15.9%	9.0%	5.6%	8.4%	7.2%	7.5%	5.2%	8.9%	7.5%

NOTE: The study results reflect the level of revenues and expenses annualized as of the latter part of 1967, together with the effect of separations charges adopted in Docket No. 17975, independent company settlement arrangements currently in effect; TWX, Telpak, Audio and Video rate changes; and offsetting MFI and WATS revenue adjustments. (See accompanying memorandum).

*Based on "Busy Hour" Apportionments.

Method 4
FULLY DISTRIBUTED EMBEDDED COST STUDY
Bell System Interstate Services
Annualized as of late 1967
(Revised)
INVESTMENT STATEMENT
SUMMARY
(Thousands of Dollars)

	Message Toll Telephone*	Wide Area Telephone Service*	Teletypewriter Exchange Service*	Telephone Grade Private Line Services	Telephone Grade Private Line Services	Telepak	Audio	Video	Other	Total
Telephone Plant and Other Investments										264
Telephone Plant in Service	8,081,600	575,000	186,600	700,300	305,900	1,146,500	87,700	288,300	133,500	11,505,400
Telephone Plant Under Construction	481,500	49,500	-	29,200	10,200	30,900	-	1,300	400	602,900
Other Investments	31,000	2,100	600	2,700	1,000	4,300	300	1,100	600	43,900
Total Gross Investment	8,594,100	626,700	187,200	732,100	317,100	1,181,700	88,000	290,600	134,600	12,152,100
Depreciation Reserve	1,901,400	130,000	48,000	156,500	119,800	222,600	24,300	74,700	22,900	2,701,200
Net Investment	6,692,700	496,700	139,200	575,600	197,300	959,100	63,700	215,900	111,700	9,451,900

*Based on "Busy Hour" Apportionments.

Method 4
FULLY DISTRIBUTED EMBEDDED COST STUDY
Bell System Interstate Services
Annualized as of late 1967
(Revised)

EXPENSES, INCOME CHARGES AND OPERATING TAXES

SUMMARY

(Thousands of Dollars)

Expenses	Message Toll Telephones	Wide Area Telephone Services	Teletypewriter Exchange Services	Telephone Grade Private Line Services	Telegraph Grade Private Line Services	Telpeak	Audio	Video	Other	Total
Traffic, Commercial and Revenue Accounting Expenses	684,200	11,400	5,400	6,200	4,200	5,300	800	1,700	700	719,900
Maintenance Expenses	448,900	32,700	13,600	42,600	37,000	63,500	7,900	18,400	4,700	669,700
Depreciation Expense	367,400	25,200	11,600	31,500	22,600	49,200	3,600	14,000	5,000	530,000
General Expenses	118,600	4,000	1,700	4,500	3,600	6,500	900	1,900	400	141,900
Operating Rents	42,300	1,600	600	2,200	1,100	2,900	300	800	600	52,200
Relief and Pensions	126,200	4,100	1,800	4,800	3,900	6,900	1,000	2,000	500	151,300
General Department Services	48,900	3,500	900	2,500	1,600	3,100	400	900	500	62,100
Total	1,836,600	82,600	35,500	94,300	74,000	137,400	14,800	39,700	12,300	2,327,100
Operating Taxes										
Federal Income Taxes	323,800	63,500	9,500	20,200	12,000	49,000	3,500	7,100	7,500	496,200
Other Taxes	207,200	15,600	4,500	15,300	7,600	25,600	2,100	6,200	3,000	287,300
Total	531,000	79,100	14,000	35,500	19,600	74,600	5,600	13,400	10,500	783,500
Income Charges	3,100	100	-	100	100	200	-	-	-	3,700
Total Expenses, Income Charges and Operating Taxes	2,770,700	161,800	49,600	129,900	93,700	212,200	20,400	53,200	22,900	3,114,300

*Based on "Busy Hour" Apportionments.

Method 5
FULLY DISTRIBUTED EMBEDDED COST STUDY
Bell System Interstate Services
Annualized as of late 1967
(Revised)

EARNINGS STATEMENT

SUMMARY

(Thousands of Dollars)

	Message Toll Telephones	Wide Area Telephones Services	Teletypewriter Exchange Services	Telephone Grade Private Line Services	Telegraph Grade Private Line Services	Telpak	Audio	Video	Other	Total
Revenues and Other Income										
Operating Revenues	2,825,700	238,300	62,100	160,700	109,800	280,200	25,100	64,300	32,800	3,798,900
Other Income	22,900	2,400	-	1,400	500	1,500	-	100	-	28,700
Total	2,848,600	240,600	62,100	162,100	110,300	281,600	25,100	64,400	32,800	3,827,600
Expenses, Income Charges and Operating Taxes										
Expenses, Income Charges and Operating Taxes except Federal Income Taxes	2,065,800	99,400	39,400	106,200	81,400	147,900	16,800	46,000	15,200	2,618,100
Federal Income Taxes	314,000	62,900	9,800	22,000	12,300	57,100	3,900	7,100	7,600	496,200
Total	2,379,800	162,300	49,300	128,200	93,500	204,900	20,300	53,200	22,800	3,114,300
Net Operating Earnings	468,800	78,300	12,800	33,900	16,800	76,700	4,800	11,200	10,000	713,400
Net Investment	6,785,000	506,700	138,600	562,200	196,400	863,900	64,200	216,700	118,300	9,451,900
Ratio of Net Operating Earnings to Net Investment	6.9%	15.5%	9.2%	6.0%	8.5%	8.9%	7.5%	5.2%	8.5%	7.5%

NOTE: The study results reflect the level of revenues and expenses annualized as of the latter part of 1967, together with the effect of separations changes adopted in Docket No. 17975, independent company settlement arrangements currently in effect; TWX, Telpak, Audio and Video rate changes; and offsetting MTT and WATS revenue adjustments. (See accompanying memorandum.)

*Based on "Busy Hour" Apportionments.

Method 3

FULLY DISTRIBUTED EMERGED COST STUDY

Bell System Interstate Services

Annualized as of late 1967

(Revised)

INVESTMENT STATEMENT

SUMMARY

(Thousands of Dollars)

267

<u>Telephone Plant and Other Investment</u>										
Telephone Plant in Service	8,327,700	995,500	175,600	643,800	301,300	959,900	63,100	288,200	130,400	11,505,400
Telephone Plant Under Construction	481,500	49,500	-	29,200	10,200	30,900	-	1,300	400	602,900
Other Investment	31,500	2,200	600	2,600	1,000	3,800	300	1,100	600	43,900
<u>Total Gross Investment</u>	<u>8,840,700</u>	<u>647,200</u>	<u>176,200</u>	<u>675,600</u>	<u>312,400</u>	<u>994,600</u>	<u>83,500</u>	<u>290,500</u>	<u>131,500</u>	<u>12,152,100</u>
<u>Depreciation Reserve</u>	<u>2,035,700</u>	<u>140,500</u>	<u>37,600</u>	<u>113,400</u>	<u>116,000</u>	<u>130,700</u>	<u>19,300</u>	<u>73,800</u>	<u>13,200</u>	<u>2,700,200</u>
<u>Net Investment</u>	<u>6,785,000</u>	<u>506,700</u>	<u>138,600</u>	<u>562,200</u>	<u>196,400</u>	<u>863,900</u>	<u>64,200</u>	<u>216,700</u>	<u>118,300</u>	<u>9,451,900</u>

*Based on "Busy Hour" Apportionments.

Method 5

FULLY DISTRIBUTED EMBEDDED COST STUDY

Bell System Interstate Services

Annualized as of late 1967

(Revised)

EXPENSES, INCOME CHARGES AND OPERATING TAXES

SUMMARY

(Thousands of Dollars)

Expenses											
Traffic, Commercial and Revenue Accounting Expenses	684,200	11,400	5,400	6,200	4,200	5,300	800	1,700	700	719,900	
Maintenance Expenses	454,700	32,900	13,400	41,600	36,900	58,800	7,800	18,400	4,600	669,700	
Depreciation Expense	375,000	25,600	11,400	30,200	22,500	42,700	3,600	14,000	5,000	530,000	
General Expenses	119,200	4,000	1,700	4,400	3,600	6,100	900	1,900	400	141,900	
Operating Rents	42,800	1,600	600	2,100	1,100	2,600	300	800	600	52,200	
Relief and Pensions	126,800	4,300	1,800	4,700	3,900	6,500	1,000	2,000	500	151,300	
General Department Services	48,900	3,500	800	2,500	1,600	3,100	400	900	500	62,100	
Total	1,851,600	83,400	35,000	91,800	73,800	125,000	14,700	39,700	12,300	2,327,100	
Operating Taxes											
Federal Income Taxes	314,000	62,900	9,800	22,000	12,200	57,100	3,500	7,100	7,600	496,200	
Other Taxes	211,100	15,900	4,400	14,400	7,500	22,700	2,000	6,200	2,900	287,300	
Total	525,100	78,800	14,200	36,400	19,700	79,800	5,500	13,300	10,500	783,500	
Income Charges											
Total Expenses, Income Charges and Operating Taxes	2,379,800	162,300	49,300	128,200	93,500	204,900	20,300	53,200	22,800	3,114,400	

*Based on "Busy Hour" Appointments.

Method 6

FULLY DISTRIBUTED EMBEDDED COST STUDY

Bell System Interstate Services

Annualized as of late 1967

(Revised)

EARNINGS STATEMENT

SUMMARY

(Thousands of Dollars)

Revenues and Other Income	Message Toll Telephone	Wide Area Telephone Services	Teletypewriter Exchange Services	Telephone Grade Private Line Services	Telegraph Grade Private Line Services	Tollpak	Audio	Video	Other	Total
Operating Revenues	2,825,700	238,300	62,100	160,800	109,800	280,200	25,100	64,300	32,800	3,798,900
Other Income	22,900	2,400	-	1,400	500	1,500	-	100	-	28,700
Total	2,848,600	240,600	62,100	162,100	110,300	281,600	25,100	64,300	32,800	3,827,600
Expenses, Income Charges and Operating Taxes	2,070,500	99,800	39,800	107,800	81,600	148,000	16,600	38,900	15,000	2,618,100
Federal Income Taxes	311,300	62,600	9,600	21,200	12,100	57,100	3,600	10,900	7,700	496,200
Total	2,381,800	162,400	49,500	129,000	93,700	205,100	20,200	49,800	22,700	3,114,300
Net Operating Earnings	466,800	78,200	12,600	33,100	16,700	76,500	4,900	14,500	10,100	713,400
Net Investment	6,852,800	511,300	13,300	562,400	197,800	846,800	62,200	172,300	109,000	9,411,900
Ratio of Net Operating Earnings to Net Investment	6.8%	15.3%	0.2%	5.9%	8.4%	9.0%	7.6%	8.4%	9.3%	7.5%

NOTE: The study results reflect the level of revenues and expenses annualized as of the latter part of 1967, together with the effect of separations changes adopted in Docket No. 17-775, independent company settlement arrangements currently in effect; TWX, Tollpak, Audio and Video rate changes; and offsetting MTT and SATS revenue adjustments. (See accompanying memorandum.)

*Based on "Busy Hour" Apportionments.

Method 6

FULLY DISTRIBUTED EMBEDDED COST STUDY

Bell System Interstate Services

Annualized as of late 1967

(Revised)

INVESTMENT STATEMENT
SUMMARY

(Thousands of Dollars)

	Message Toll Telephones	Wide Area Telephone Services	Teletypewriter Exchange Services	Telephone		Telegraph Grade Private Line Services	Telook	Audio	Video	Other	Total
				Grade	Private						
<u>Telephone Plant and Other Investments</u>											
Telephone Plant in Service	8,291,100	592,600	183,700	682,400		303,800	1,005,400	83,500	228,600	130,200	11,505,400
Telephone Plant Under Construction	481,500	49,500	-	29,200		10,200	30,900	-	1,300	400	602,900
Other Investments	31,500	2,200	600	2,700		1,000	4,100	300	800	600	43,900
<u>Total Gross Investment</u>	8,804,100	644,300	184,400	714,300		317,000	1,040,400	83,800	230,700	131,300	12,152,100
<u>Depreciation Reserve</u>	1,991,300	133,000	47,100	151,900		119,200	193,600	23,600	58,200	22,300	2,700,200
<u>Net Investment</u>	6,812,800	511,300	137,300	562,400		197,800	846,800	62,200	172,500	109,000	9,451,900

*Based on "Busy Hour" Apportionments.

Method 6

FULLY DISTRIBUTED EMBEDDED COST STUDY

Bell System Interstate Services

Annualized as of late 1967

(Revised)

EXPENSES, INCOME CHARGES AND OPERATING TAXES

SUMMARY

(Thousands of Dollars)

Expenses	Message Toll Telephones	Wide Area Telephone Services	Teletypewriter / Exchange Services	Telephone		Telegraph Grade Private Line Services	Toll	Audio	Video	Other	Total
				Grade	Private						
Traffic, Commercial and Revenue Accounting Expenses	684,200	11,400	5,400	6,200	4,200		5,300	800	1,700	700	719,900
Maintenance Expenses	457,500	33,100	13,500	41,900	37,000		58,100	7,800	15,800	4,500	669,700
Depreciation Expense	377,200	25,800	11,500	30,700	22,600		42,800	3,500	11,000	4,800	530,000
General Expenses	119,400	4,000	1,700	4,400	3,600		6,000	900	1,700	400	141,900
Operating Rents	42,800	1,600	600	2,200	1,100		2,600	300	600	600	52,200
Relief and Pensions	127,000	4,300	1,800	4,700	3,900		6,400	1,000	1,800	500	151,300
General Department Services	48,000	3,500	800	2,500	1,600		3,100	400	900	500	62,100
Total	1,857,000	83,800	35,300	92,700	73,900		124,400	14,600	33,500	12,000	2,327,100
Operating Taxes											
Federal Income Taxes	311,300	62,600	9,600	21,200	12,100		57,100	3,600	10,900	7,700	496,200
Other Taxes	210,400	15,900	4,500	15,000	7,600		23,500	2,100	5,300	2,900	287,300
Total	521,700	78,500	14,200	36,200	19,600		80,600	5,700	16,200	10,700	783,500
Income Charges	3,100	100	-	100	100		200	-	-	-	3,700
Total Expenses, Income Charges and Operating Taxes	2,381,800	162,400	49,500	129,000	93,700		205,100	20,200	49,800	22,700	3,114,300

*Based on "Busy Hour" Apportionments.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

LONG LINES DEPARTMENT

32 AVENUE OF THE AMERICAS

NEW YORK, N. Y. 10013

EX-100
 TELEPHONE RATES AND TARIFFS

AREA CODE 212
 393-7277

October 1, 1969

COMMON CARRIER

November 1, 1969

Federal Communications Commission
 Washington, D. C. 20541

ROOM 500
 RATES DIVISION

Attention: Common Carrier Bureau

The major pricing tariff material, issued by the American Telephone and Telegraph Company, Long Lines Department, is sent to you for filing in compliance with the requirements of the Communications Act of 1934, as amended. This material consists of the following, effective November 1, 1969:

Form No. 1, 1969 - 7114, revised page 1
 Form No. 2, 1969 - 7114, revised page 2
 Form No. 3, 1969 - 7114, revised page 3
 Form No. 4, 1969 - 7114, revised page 4
 Form No. 5, 1969 - 7114, revised page 5

This filing provides for changes in regulations and rates for TELAR (Long Lines) service. The tariff revisions provide for (a) an increase in rates for TELAR long distance service, (b) a change from (c) in the cost of 150 baud service to (d) in the number of telegraph channels having the equivalent of one voice grade channel and (e) an increase in rates for certain service terminals. A tabular summary of existing and proposed rates involved in this filing is set out in Attachment A to this letter.

Increase in rate levels accomplished by this filing is supported by cost and market studies of the TELAR and private line markets and will improve the revenue-cost relationship of TELAR and increase the contribution of that service to overall earnings. Summaries of the study results and supporting data together with a more detailed explanation of this filing have been furnished to the Commission's Common Carrier Bureau.

ATTORNEY GENERAL

A copy of the report and data of receipt of this filing, heretofore
transmitted, is attached for this purpose. All
communications and inquiries in connection with this filing, should be
addressed to the U. S. Attorney, Southern District of New York, 100
Broadway, New York, N. Y., or to the U. S. Attorney, Southern
District of New York, 100 Broadway, New York, N. Y.

W. C. Bennett
Administrator Notes and Tariffs

Attachments:
Application Letter
Tariff Notes
Attachment A

Monthly Rates per Airline Mile
 Capacity (2000 words)

Monthly Rates

Present		Proposed	
First Station in an Exchange	Subsequent Station	First Station in an Exchange	Subsequent Station
5401	15.00	10.00	15.00
5402	15.00	10.00	15.00
5403	15.00	10.00	15.00
5404	15.00	10.00	15.00
5405	15.00	10.00	15.00
5406	15.00	10.00	15.00
5407	15.00	10.00	15.00

Telegraph Type

5101	15.00	10.00	15.00	15.00
5102	15.00	10.00	15.00	15.00
5103	15.00	10.00	15.00	15.00
5104	15.00	10.00	15.00	15.00
5105	15.00	10.00	15.00	15.00
5106	15.00	10.00	15.00	15.00

Telephotograph Type

5402	100.00	15.00	140.00	10.00
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Data Type

5401	15.00	10.00	15.00	15.00
5402	45.00	10.00	15.00	15.00

Base Capacity

Monthly Rates per Airline Mile

	Present	Proposed
Type 5700	\$28.00	\$30.00
Type 5800	60.00	85.00

01129 46.67

Page 1 to 44.1 inclusive of this tariff are effective as of the date shown. Pages 45 to 44.1 contain all amendments, additions and deletions to the tariff that are in effect on the date hereof.

* Pages issued October 1, 1969.

AM. TEL. & TEL. CO. L. L. DEPT.
 Adm. Rates and Tariffs
 32 Ave. of the Americas, New York, N.Y. 10013
 Issued: October 1, 1969

TARIFF F.C.C. NO. 260
 7th Revised Page 81
 Cancels 6th Revised Page 81
 Effective: November 1, 1969

PRIVATE LINE SERVICE

3. CHANNELS (Cont'd)

3.2 Classification and Rates (Cont'd)

3.2.5 Series 5000 Channels (Cont'd)

(A) Types and Description (Cont'd)

(2) Terminating Arrangements (Cont'd)

(b) Service Terminals for Use as Channels of a Lesser Capacity

Voice: Service terminals suitable for terminating channels having transmission characteristics and with terminating arrangements similar to those furnished under Series 2000 and Series 3000 (Type 3001 only) channels. The types of Series 5000 voice service terminals are as follows:

Type 5201
 Type 5202
 Type 5203
 Type 5204
 Type 5205
 Type 5206
 Type 5301

Teletypewriter: Service terminals suitable for terminating channels having transmission characteristics and with terminating arrangements similar to those for channels furnished under Series 1000 channels. The types of Series 5000 teletypewriter service terminals are as follows:

Type 5101
 Type 5102
 Type 5103
 Type 5104
 Type 5105
 Type 5106

Two such channels, or any portion thereof, or a combination, not exceeding two, of such channels, between the same pair of service points, have the equivalent of one voice grade channel.

(C)
 (C)

AM. TEL. & TEL. CO. L. L. DEPT.
Adm. Rates and Tariffs
32 Ave. of the Americas, New York, N.Y. 10013
Issued: October 1, 1969

TARIFF F.C.C. NO. 260
14th Revised Page 84
Cancels 13th Revised Page 84
Effective: November 1, 1969

PRIVATE LINE SERVICE

3. CHANNELS (Cont'd)

3.2 Classification and Rates (Cont'd)3.2.5 Series 5000 Channels (Cont'd)(C) Rates(1) Base Capacity

	USOC	Per Airline Mile Per Month
Type 5700	1LKCW	\$30.00 (I)
Type 5800	1LKDW	85.00 (I)

(2) Service Terminals

A service terminal is required for each service arranged for use by the customer, for each connection of such service to a station, or for each connection of such service to a Telephone Company office for the purpose of establishing a channel in connection with Foreign Exchange Service. Where a channel switching arrangement is provided, each station at the switching point requires a service terminal for each of the channels to which it is connected and which can be operated as a separate channel. The charges set forth below apply.

(a) Service Terminals for Use as a Wideband Channel

- (i) For the first station in an exchange or for a connection to a Telephone Company office on each service in use, except that where service terminals of the types specified in (iii) following are furnished at an exchange in connection with a wideband multiway switching arrangement or a wideband select and control arrangement, the charges are as set forth therein:

Each city zone is considered an exchange where the rate mileage measurement as set forth in 3.1.3(C)(1)(b) is applicable.

Per Service Terminal

	USOC	Monthly Charge	Installation Charge
Type 5701	DY4	\$425.00	\$200.00
- Supplementary control arrangement	T5W	65.00	100.00
Type 5703	91D	425.00	200.00
Type 5706	P3X	425.00	200.00
Type 5707 (furnished only at 250 Watt UHF transmitting and receiving stations (USOC OXO) specified in 4.2.3 following)	XP1	560.00	400.00
Type 5708	UP6	150.00	100.00
Type 5751	DZ4	650.00	200.00
- Supplementary control arrangement	T5W	65.00	100.00
Type 5753	3UM	945.00	500.00

AM. TEL. & TEL. CO. L. L. DEPT.
 Adm. Rates and Tariffs
 32 Ave. of the Americas, New York, N.Y. 10013
 Issued: October 1, 1969

TARIFF F.C.C. NO. 260
 9th Revised Page 85
 Cancels 8th Revised Page 85
 Effective: November 1, 1969

PRIVATE LINE SERVICE

3. CHANNELS (Cont'd)

3.2 Classification and Rates (Cont'd)

3.2.5 Series 5000 Channels (Cont'd)

(c) Rates (Cont'd)

(2) Service Terminals (Cont'd)

(b) Service Terminals for Use as Channels of a Lesser Capacity

- (1) Put the first station in an exchange or for a connection to a Telephone Company office on each service in use.

Each city zone is considered an exchange when the rate mileage measurement as set forth in 3.1.3(C)(1)(b) is applicable.

Per Service Terminal

	USOC	Monthly Charge	Installation Charge
<u>Voice:</u>			
Type 5201	TP3	\$ 35.00 (1)	\$ 20.00
Type 5202	Q5Y	35.00	20.00
Type 5203	88X	35.00	20.00
Type 5204	UUX	35.00	20.00
Type 5205	Z8X	35.00	20.00
Type 5206	ZUP	35.00	20.00
Type 5301	UMP	35.00	20.00
<u>Teletypewriter</u>			
Type 501	VDG	35.00	20.00
Type 502	SBM	35.00	20.00
Type 503	U3M	35.00	20.00
Type 504	VVP	35.00	20.00
Type 505	VWP	35.00	20.00
Type 506	4MT	35.00	20.00
<u>Telephone Graph</u>			
Type 544	WBM	140.00	20.00
<u>Data</u>			
Type 530	YBM	35.00	20.00
Type 540	3GP	255.00 (1)	20.00

AM. TEL. & TEL. CO. L. L. DEPT.
 Adm. Rates and Tariffs
 32 Ave. of the Americas, New York, N.Y. 10013
 Issued: October 1, 1969

TARIFF P.C.C. NO. 260
 13th Revised Page 86
 Cancels 12th Revised Page 86
 Effective: November 1, 1969

PRIVATE LINE SERVICE

3. CHANNELS (Cont'd)

3.2 Classification and Rates (Cont'd)

3.2.5 Series 5000 Channels (Cont'd)

(C) Rates (Cont'd)

(2) Service Terminals (Cont'd)

(b) Service Terminals for Use as Channels of a Lesser Capacity (Cont'd)

- (ii) For the second or subsequent station in an exchange on any individual service.

Per Service Terminal	USOC	Monthly Charge	Installation Charge
<u>Voice</u>			
Type 5201	TT3	\$15.00	(I) \$20.00
Type 5202	3JP	15.00	20.00
Type 5203	4HP	15.00	20.00
Type 5204	4JP	15.00	20.00
Type 5205	5HP	15.00	20.00
Type 5301	6GP	15.00	20.00
<u>Teletypewriter</u>			
Type 5101	WDG	15.00	20.00
Type 5102	4GP	15.00	20.00
Type 5103	6HP	15.00	20.00
Type 5104	7GP	15.00	20.00
Type 5105	THP	15.00	20.00
Type 5106	4OW	15.00	20.00
<u>Data</u>			
Type 5302	8GP	15.00	20.00
Type 5401	BJP	25.00	20.00
<u>Telephotograph</u>			
Type 5402	6JP	20.00	(I) 20.00

(c) Move Charges

When a service terminal is moved to a different building, installation charges apply.

When a service terminal is moved to a new location within the same building, one-half the installation charge applies.

(3) Connecting Arrangements

A connecting arrangement is required for each connection of a channel furnished under this series to:

- An interexchange channel furnished under other series, except where connection is by means of a switching arrangement.
- An alternate use arrangement, as specified in (5) following, except where a connecting arrangement, for the purpose specified in (a) preceding, or a service terminal is provided.

A connecting arrangement charge equal to the service terminal charge for the first station on such channel or for a connection to a Telephone Company office as specified in (C)(2)(a)(i) or (C)(2)(b)(i) preceding applies for each such connecting arrangement as appropriate.

Connecting Arrangement	USOC
Wideband Channel	
Type 5701	P8G
Type 5703	P8V
Channels of a Lesser Capacity	
Voice	CD3
Telegraph	CG3
Telephoto	CG4
Data	
Type 5302	CY4
Type 5401	KR4

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

195 BROADWAY, NEW YORK, N. Y. 10007

AREA CODE 212 393-1000

F. MARK GARLINGHOUSE
VICE PRESIDENT

October 1, 1969

Mr. Ben F. Waple, Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Dear Mr. Waple:

In recognition of the Statement on Ratemaking Principles and Factors in Docket No. 16258, Phase 1-B (Appendix A of the Commission's Memorandum Opinion and Order, adopted July 29, 1969, 18 F.C.C. 2d 761, 765), American Telephone and Telegraph Company has been engaged in intensive studies of costs, market conditions, and rate levels for its principal interstate services. We have now completed certain implementing studies called for by the Statement and we have filed related rate adjustments based thereon, as the Commission noted would be done by October 1. (18 F.C.C. 2d 761, 763, 765.)

As contemplated by the Statement (paras. 2 and 11) (18 F.C.C. 2d at 766, 767), in making these studies, we have worked closely with the Commission's Staff, through informal discussions. We have kept them informed of the details of the studies and have consulted with them continuously with respect to the methodology to be followed. There have also been a number of general meetings in which representatives of interested customer groups have participated with representatives of the F.C.C. Staff and A.T.&T. In addition, there have been many meetings between representatives of A.T.&T. and customer groups, for example, the airlines and the broadcasters, devoted to their particular areas of interest. At these conferences, there have been lengthy and detailed presentations and discussion of the methods of cost and market analyses, and substantial amounts of data, including details as to these analyses, have been supplied to the participants.

A.T.&T. has taken the initiative in seeking out the expression of views from the interested users regarding the studies being conducted by A.T.&T. We believe that

interested persons have been afforded a full opportunity to express their views with respect to the formulation of the appropriate methods. We also believe that the studies which have been conducted by A.T.&T. are in conformity with the principles agreed to in the above Statement of Ratemaking Principles. Of course, as contemplated by the Statement, we intend to continue to make such studies of these matters as may be appropriate.

The results of the studies which have now been completed have been made available to the parties to the Statement through A.T.&T.'s offices in New York and Washington. Copies of essential materials have also been distributed directly to the Commission's Staff and to representatives of the customer groups immediately affected who have been actively participating in the meetings.

Consistent with the results of these studies, A.T.&T. has filed specific rate adjustments for the interstate television and audio transmission, TELPAK, and TWX services. The television rates were filed August 29; they become effective October 2, 1969, after a one-day suspension and an accounting requirement by order of the Commission. The rate adjustments for the other services mentioned have been filed to become effective November 1, 1969. It is estimated that on the basis of the end-of-1969 market, these rate adjustments would increase the Bell System's interstate revenues by approximately \$87 million on an annual basis. In accordance with our discussions from time to time with Commission representatives, it is our intention to offset this revenue increase by adjustments in the rates for interstate message toll telephone service (MTT) and wide area telephone service (WATS). However, such offsetting reduction does not represent any concession that A.T.&T.'s overall interstate rate of return would, without the reduction, exceed an appropriate level. The effectiveness of these MTT and WATS rate adjustments would depend on when the increased rates which have been filed for the TELPAK and TWX services become effective.

Very truly yours,

F. M. Garlinghouse

F. M. Garlinghouse

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RATE ADJUSTMENTS

MARKET DATA

COST DATA

REVISED TARIFF PAGES

TELPAK RATE ADJUSTMENTSBackground

In January 1961 following the Above 890 case (F.C.C. Docket No. 11866) in which the Commission revised the rules governing the licensing of private microwave systems, TELPAK was instituted in order to provide customers having volume point-to-point communications needs a practical choice between private microwave systems and common carrier services. Four base capacity classifications having the following rates were filed:

	<u>Monthly Rate</u>
TELPAK Base Capacity A	\$15 per airline mile
B	\$20 " " "
C	\$25 " " "
D	\$45 " " "
Service Terminal (Voice and Telegraph Grade)	\$15 per terminal
Tgh/Tph Equivalency	12/1

The relationship of revenue to cost for the total TELPAK service category is in large part dependent upon the relative amounts of the classifications furnished, and the extent to which, on the average, customers utilize the TELPAK base capacities (base capacity fill). The TELPAK market

developed with a much larger proportion of TELPAK D and a considerably higher average fill than had been anticipated and the contribution to the overall earnings from interstate services expected of TELPAK was not attained.

In September 1961 the Commission instituted F.C.C. Docket No. 14251 to investigate TELPAK. This investigation resulted in the Commission's Memorandum Opinion and Order released November 10, 1966 (7 F.C.C.2d 30) which in substance ordered AT&T to unify the rates for TELPAK A and B with those for the other private line services and to furnish TELPAK C and D cost data along with proposals for any appropriate rate changes. On January 9, 1967 in response to the foregoing order a filing was made eliminating TELPAK A and B (Transmittal No. 9467). This filing ultimately took effect on August 1, 1967 along with certain revisions in the rates for other private line services.

In addition to the above filing, the Bell System, on January 9, 1967, proposed revised TELPAK C and D rates which were needed to improve what was considered to be a poor cost/revenue relationship in this service. The rates then proposed were:

	<u>Monthly Rate</u>
TELPAC Base Capacity C	\$30 per mile
D	\$85 " "
Service Terminal	\$35 per terminal
Tgh/Tph Equivalency	2/1

These rates, which market and cost studies at that time indicated would significantly improve the cost/revenue relationship, were subsequently filed on February 1, 1968 by Transmittal No. 10001.

Following assertions by some TELPAK users that there would be insufficient time to adjust to TELPAK rate changes of this magnitude, AT&T withdrew the February 1968 filing in favor of a substitute filing specifying interim rate levels set about midway between the then effective rates and those filed in February 1968. These rates, filed on March 25, 1968 by Transmittal No. 10069, were:

	<u>Monthly Rate</u>
TELPAK Base Capacity C	\$28 per mile
D	\$60 " "
Service Terminal	\$25 per terminal

The above rate schedule, currently in effect, became effective September 1, 1968. The relevant cost and market considerations indicated that the TELPAK rate levels embodied in the February 1, 1968 filing were fully justified. The interim schedule was considered to be an intermediate step toward the level of TELPAK rates required to improve the revenue/cost relationship to the degree indicated to be desirable by earlier market and cost studies, and as presented by Mr. Ellinghaus in his testimony in F.C.C. Docket No. 16258.

(See Transmittal No. 10069) Further studies as described herein have been made of the private line market for the end of 1971 at various rate schedules, and these studies have reaffirmed the need for a further upward adjustment of the TELPAK rate level.

TELPAK Rate Changes

The cost and market studies mentioned above involved analysis of four different test rate schedules for TELPAK. The major rate components of the existing TELPAK schedule and the four test schedules are as follows:

	<u>Present Rates</u>	<u>Schedule No. 1</u>	<u>Schedule No. 2</u>	<u>Schedule No. 3</u>	<u>Schedule No. 4</u>
<u>Base Capacity</u>					
TELPAK C	\$ 28	\$ 28	\$ 25	\$ 30	\$ 40
TELPAK D	60	60	45	85	115
<u>Service Term.- Conn. Arrangements</u>					
Voice or TTY	25	25	15	35	40
Additional Voice or TTY	10	10	5	15	17.50
Telephoto	100	100	60	140	150
<u>Tgh/Tph Equivalency</u>					
Up to 75 baud	6/1	2/1	12/1	2/1	2/1
Up to 150 baud	3/1	2/1	4/1	2/1	2/1

The results of the incremental cost and revenue studies for these schedules, including related effects on other private line and switched services, have been presented in tabular form in the accompanying cost study summaries.

As indicated in Mr. Ellinghaus' testimony referred to above, it is our view that for a competitive private line offering such as TELPAK, rate levels should be established which, in addition to being competitively effective, will contribute as much to total revenue requirements as is reasonably practicable, taking into account market conditions, rate relationships and other significant noncost considerations. Substantial improvement in the revenue/cost relationship for TELPAK is required to achieve this objective.

The results of the cost and revenue studies demonstrate that the rates specified in Schedule No. 3 are fully warranted. These rates will improve TELPAK's revenue/cost relationship and will increase significantly the contribution which the TELPAK service makes to overall revenue requirements without the more severe customer impact which would result from the imposition of a significantly higher rate level. Accordingly we have concluded that the appropriate TELPAK rate adjustments at this time are those specified in Schedule No. 3.

Studies and analyses of conditions experienced under these rates are being planned in order that we may be in a position to continue to evaluate the appropriateness of these rates.

Schedule No. 3 also includes a telegraph to telephone channel equivalency ratio of 2 to 1. The overall relationship between the costs of telephone and telegraph (60-75 speed) type channels (including both terminal and line costs) is slightly under 2 to 1. While considerably more than two telegraph channels can physically be derived from a voice channel, this is offset by the fact that terminal costs for telegraph channels are considerably higher than those for telephone. It is the combined effect of these two phenomena that results in the overall cost relationships referred to above. In TELPAK, we have reflected this characteristic by keeping the telephone and telegraph service terminal rate levels the same (\$35), and maintaining the overall revenue/cost balance through adjustment of the equivalency to 2 to 1.

Schedule No. 3 also includes an increase in the telephotograph service terminal rate from \$100 to \$140 per terminal per month to retain the present rate relationship with the telephone terminal rate. The data service terminal type 5401 is adjusted from \$245 to \$255 for the same reason.

PRIVATE LINE TELEPHONE AND TELEGRAPH

Revised tariffs for private line telephone and telegraph channel rates were filed on January 9, 1967 (Transmittal No. 9467).

As presented in Mr. Ellinghaus' testimony in F.C.C. Docket No. 16258, these tariff revisions for private line telephone grade services were designed to effect improvements in internal rate structure and not materially to affect the general rate level. The tariff revisions for private line telegraph channels were designed to raise the general level of rates to improve the revenue/cost relationship for the service.

After deferral at the request of the Commission the tariff revisions for both private line telephone and telegraph channels went into effect on August 1, 1967 and subsequently became subject to investigation in F.C.C. Docket No. 18128. The market study just completed included two alternative rate levels for private line telephone and telegraph channels along with the four TELPAK test schedules. (Test Schedules No. 5 and No. 6) The results of these studies are presented in the cost summaries attached hereto.

We have concluded that no rate adjustments for the private line telephone or private line telegraph services should be filed at this time.

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**INTERSTATE
PRIVATE LINE MARKET STUDY**



American Telephone & Telegraph Company

SEPTEMBER 1969

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INTERSTATE PRIVATE LINE MARKET STUDYSCOPE

The purpose of this market study was to obtain the best available information concerning the anticipated future use of communications services by private line customers under varying private line rates.

Source data for evaluation of the various market responses were obtained primarily from estimates of the impact of the test rate schedules (Tab 2, Attachment 2-A) on future communications usage of 101 customers' accounts selected through accepted statistical techniques (Tab 5) to represent the total market. The sample selected accounted for approximately 75% of the total interstate point to point private line mileage in the February 1969 interstate private line services inventory. The future market tested was for December 1971.

Because of the wide variation in usage and requirements among the approximately 19,700 interstate private line customers, the market was stratified as follows:

1. Government
2. Airlines
3. Railroads
4. Truckers
5. All Others (manufacturers, wholesalers, financial, etc.)

Individual customer analysis was done by Telephone Company Account Managers regularly assigned to the selected accounts for communications planning, consulting and selling.

For airlines, truckers and railroads, telephone company personnel at Long Lines and AT&T headquarters, who work as Marketing and Sales industry specialists, were called upon to assist in the evaluation of the overall industry market responses (Tab 6).

The basic method used in making the study required that the Account Manager estimate the future private line market of his customer under present rate conditions from February 1969 to December 1971, and then estimate any impact on the December 1971 market due to six rate changes in the private line and Telpak services (Tab 6). His analysis included the effects of internal shifts with other Bell System services, external shifts with competitive services as well as repression and stimulation of demand.

In addition, the Account Manager was asked to consider, where applicable, the time lag of implementation of decisions to utilize alternative communications arrangements. Accordingly, if alternative arrangements were anticipated, the amount of mileage shifted to or from each class of private line service due to substitution

of other services, repression or stimulation of demand that could be implemented by December 1971 was recorded on study forms. Also the total amount of shift, and the year in which it was estimated that the alternative arrangements could be completely adapted was recorded.

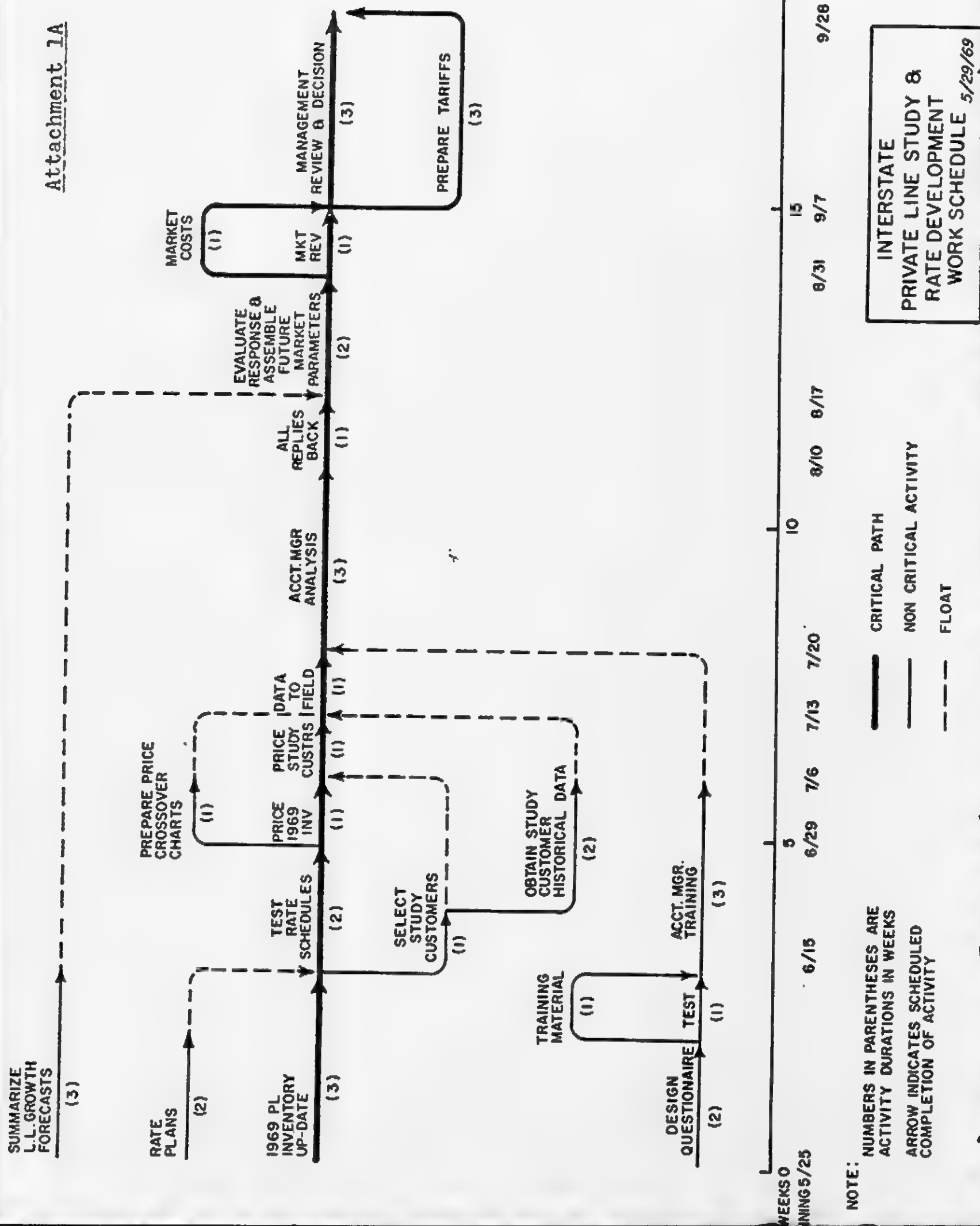
Market size and make up under the various rate situations were estimated in detail for Telpak C&D channel miles in use, C&D section miles, service terminals and connecting arrangements. For private line telephone and teletypewriter services, airline miles by mileage bands, sections and service terminals were also estimated. To assist the Account Manager in his analysis, the latest available historical usage and revenue inventory data for his customer as well as inter-services pricing cross over charts were furnished to him. Documentation describing the basis for his judgement and analysis along with a background narrative of past and present communications usage was submitted by each Account Manager along with the required market statistical data.

Data from each Account Manager in the detail outlined above were expanded on a statistical basis to obtain for each market stratum and the total market both the December 1971 market demand, and the incremental change in demand from the 1971 market at present rates

and shift to or from other alternative services under each test rate (see Market Study Appendix). These data were furnished to the Engineering Economics Organization in order that relative costs could be determined. Revenues were also calculated by the marketing organization from these market quantities.

Attachment 1-A is a "CPM" chart showing the schedule followed in this study.

Attachment 1A



TEST RATES AND ASSUMPTIONS

The market study method was developed to effectively assess the effect on market demand for Telpak and private line services of various alternative rate schedules. Accordingly, the study plan was designed to determine incremental market demand changes under various private line and Telpak rate levels. The Account Managers selected were given a set of six test rates under which they evaluated their customers' future communications usage response in comparison with anticipated future usage under present rate conditions.

Basic assumptions underlying the study were as follows:

1. Present rates and regulations for all interstate services except those under study and including long distance

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message service, WATS and TWX remained in effect throughout the test period.

2. Each test rate schedule reflected changes in rate level with rate structure for the elements of Telpak, private line telephone and teletypewriter remaining essentially the same.
3. Telpak sharing regulations would remain as in effect on July, 1969.
4. No major change in the economy's rate of growth.

Summary of Test Rates.

Six test rate schedules were used with a pattern of variation such that market response was evaluated under the following:

Test Rate 1 - Telpak teletypewriter equivalency change only; private line rates remaining the same.

Test Rate 2 - Decreased Telpak rates to pre-August 1968 levels; private line rates remaining the same.

Test Rate 3 and 4 - Increased Telpak rates with all other private line rates remaining the same.

Test Rate 5 and 6 - Measure the effects of a 15% increase and 15% decrease respectively in private line telephone and teletype-writer rates with Telpak rates remaining the same.

5. Detailed description of test rates is shown on Attachment 2-A.

INTERSTATE PRIVATE LINE MARKET STUDY

	Present Rates	Test Rate Schedules				
		1	2	3	4	5
TELPAK						
IXC/MILE						
C	\$28	28	25	30	40	28
D	\$60	60	45	85	115	60
Svc. Terms & Conn. Argts.						
TPH & TTY	\$25	25	15	35	40	25
Wideband	425	425	300	425	500	425
Multiway sw. argt.						
Line	150	150	100	150	175	150
Trunk	230	230	175	230	275	230
300						
Additional Service						
Terminals	10	10	5	15	17.50	10
Additional Service						
Terminals for Use as a Wideband Channel	300	300	195	300	350	300
Tgh. Equip.	6/1	2/1	12/1	2/1	2/1	6/1
150 Baud	3/1	2/1	4/1	2/1	2/1	3/1

PL TPH	Present Rates		Test Rate		Schedules			
	1	2	3	4	5	6		
IXC/Mile								
0-25	\$3.00	Present	Present	Present	115% of Present	85% of Present		
26-100	2.10	"	"	"	"	"		
101-250	1.50	"	"	"	"	"		
251-500	1.05	"	"	"	"	"		
Over 500	.75	"	"	"	"	"		

Svc. Terms
First
Additional

\$12.50
7.50

PL TTY

IXC/Mile								
0-100	1.40	Present	Present	Present	115% of Present	85% of Present		
101-250	.98	"	"	"	"	"		
251-500	.56	"	"	"	"	"		
501-1000	.42	"	"	"	"	"		
Over 1000	.28	"	"	"	"	"		
Svc. Terms								
First	\$25.00	"	"	"	"	"		
Additional	7.50	"	"	"	"	"		

MARKET DEMAND AND REVENUE RESULTSGENERAL

The relationship of the results of the test rate schedules to the results under the December, 1971 present rate in terms of total interstate market demand and revenue are outlined below.

The attached Tables 1 to 4 summarize the total market demand and revenue data. Shift data and further detailed market demand and revenue data are contained in the Market Study Appendix.

Test Rate 1.

The demand for private line services remained relatively steady with a slight decrease of Telpak usage from 43.3 to 43.1 million telephone channel miles and from 5.9 to 5.7 million teletypewriter channel miles mostly due to repression.

Total annual PL revenues increased from \$517 million to \$521 million.

Test Rate 2.

Relatively minor increases are indicated in

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Telpak telephone channel miles from 43.3 to 44.4 million miles and Telpak teletypewriter channel miles from 5.9 to 6.2 million miles due primarily to stimulation.

Total annual PL revenues dropped significantly from \$517 million to \$447 million. Also a slight revenue loss in LD/WATS* of about \$340,000 annually is estimated due to shifts to Telpak.

Test Rate 3.

A significant decrease in Telpak telephone channel miles from 43.3 to 38.3 million miles and Telpak teletypewriter channel miles from 5.9 to 5.2 million miles resulted.

Sizable shifts of Telpak telephone channel miles to competitive PMW (2.9 million miles), LD/WATS (.6 million miles) and repressed demand (1.1 million miles) were indicated. Also some minor shift from Private Line Telephone to LD/WATS occurred.

Total annual PL revenues increased significantly from \$517 million to \$568 million. In

* "LD" is used here as synonymous with Message Toll Telephone (MTT) service.

-3-

addition it is expected that shifts from Private Line Services to LD/WATS would amount to about \$9.9 million annually.

Test Rate 4.

Large decreases in Telpak usage in both telephone channel miles from 43.3 to 24.3 million miles and teletypewriter channel miles from 5.9 to 2.5 million miles were shown. Major shifts to competitive PMW (13 million miles) of Telpak telephone channel miles and (3 million miles) of Telpak teletypewriter channel miles. Telpak repressed demand accounts for about 1.8 million miles.

Total annual PL revenues decreased from \$517 million to \$505 million. Increases in LD/WATS would be about \$42 million annually due to shifts from private line services.

Test Rate 5.

The Telpak market remains relatively unchanged from the expected Telpak market at present rates. There would be a slight decrease in PL telephone demand from

6.8 to 6.5 million miles due to some shift to LD/WATS (.14 million miles), a relatively minor shift to Series 8000 and some repressed demand.

Total annual PL revenues increased from \$517 to \$539 million. Also an annual increase of LD/WATS of about \$3.8 million would be expected due to shifts from private line services.

Test Rate 6.

Telpak telephone channel miles decreased very slightly with .18 million miles shifting to private line telephone.

The private line telephone market demand increased from 6.8 to 7.3 million miles. This was caused principally by shifts from Telpak (.1 million miles), Series 8000 (.1 million miles) and LD/WATS (.25 million miles).

Total annual PL revenues decreased from \$517 to \$495. In addition annual decreases of about \$3.4 million are estimated for LD due to shifts to private line services.

MARKET STRATA

The following material summarizes the responses of the five market strata to the six test rates. Statistical market and revenue summaries are contained in Tables 5 to 14 attached. Data pertaining to shifts to and from other Bell System and non-Bell services as well as stimulation and repression of demand can be found in the Market Study Appendix.

Government

Cuts in the military budget as announced during August, 1969 will have a dampening effect on the amount of interstate services purchased from the Bell System by the Federal Government. Even if there were no changes in any rates the projection of usage of telephone channel miles in Telpak shows an overall reduction of greater than five percent by December, 1971. A similar decrease in teletypewriter channel miles is also expected.

Test rates #1, 2, 5 and 6 would have no significant impact on the Government's use of Telpak service.

Test rate #3 would cause a significant increase in cost to the customer. A reduction of 2,727,000 telephone and 271,000 teletypewriter channel miles can be anticipated. Most of this reduction (over two million miles) can be expected to be placed on private microwave with the balance (545,000 telephone and 54,000 teletypewriter miles) repressed. This is expected to occur in those areas where there are large concentrations of services and very heavy cross sections which can be replaced by very high capacity private microwave systems.

Test rate #4 is expected to cause the customer to replace as much as 5,431,000 telephone and 554,000 teletypewriter channel miles with private microwave. To build a system of this size will require an enormous expenditure of manpower and money, and it is expected that the system could not be completed until after 1971.

Airlines

At present rates, an overall growth of approximately 30 percent is projected in telephone channel miles from February, 1969 to

December, 1971. Test rates #1, 2 5 and 6 will not have a significant impact on the airlines communications.

Test rate #3 could cause the airlines to reduce their service in Telpak by 487,000 telephone and 210,000 teletypewriter channel miles and to force a more intensive use of Telpak base capacity by raising fill ratios. It is the consensus of the Account Managers and the Industry Specialists that the industry will not shift to private microwave at test rate #3.

It is believed that an increase in Telpak rates in the magnitude of test rate #4 would be sufficient to cause the airlines industry to build a private microwave system which would completely replace all interstate private line and Telpak services. The only Bell System private line services which would remain would be intrastate circuits used to piece out the private microwave system.

Railroads

Growth from February, 1969 to December, 1971

at present rates is estimated to be approximately 40 percent for telephone and 8 percent for teletypewriter services in Telpak. Test rates #1, 2, 5, and 6 would have a negligible effect on the railroads.

Test rate #3 would have a major impact and could lead to diversions to customer owned coaxial systems, especially in the east coast corridor. The losses, primarily to private coaxial service, expected under test rate #3 would be 164,000 telephone and 120,000 teletypewriter channel miles.

Implementation of test rate #4 would, according to account managers' analysis, make it economically feasible to expand the coaxial system even further than under test rate #3 and also build substantial amounts of private microwave. The expected losses under test rate #4, primarily to coaxial and private microwave would be 465,000 telephone and 275,000 teletypewriter channel miles.

Truckers

The forecast for truckers at present rates

from February, 1969 to December, 1971 was for a 21 percent growth in telephone channel miles. Test rates #1, 2, 5 and 6 would have no significant effect on this industry group.

Test rate #3 would result in major reconfiguring of the truckers' shared Telpak with the elimination of 169,000 telephone and 22,000 teletypewriter channel miles. Most of this loss, 134,000 telephone miles, would be diverted to WATS with 31,000 telephone and 22,000 teletypewriter miles being replaced with private microwave.

It was estimated that test rate #4 would create greater losses from Telpak than test rate #3 with 178,000 telephone miles being diverted to WATS and 43,000 telephone and 31,000 teletypewriter miles replaced by private microwave.

All Others

At present rates, an extremely high overall growth rate, 80 percent, is estimated from February, 1969 to December, 1971 for telephone channel miles in Telpak. The overall growth rate for teletypewriter

is 13 percent.

The effects of test rates #1, 5 and 6 were negligible. Those shifts which did occur were between Telpak and private line with minimum loss of Bell System service.

Test rate #2 would result in a net increase in telephone channel miles of 584,000 miles with 335,000 of this being a result of stimulation of new usage. The balance was service diverted from other Bell System services, primarily private line. In addition a major shift was estimated from C to D Telpak as a result of 2 C Telpaks being more expensive than 1 D under this test rate.

The impact of test rate #3 would be a loss of 1,474,000 telephone channel miles and 105,000 teletypewriter channel miles. The losses in telephone miles are 180,000 miles repressed, 665,000 miles to private microwave and the balance, 628,000 miles, distributed among Bell System private line and common user services.

At this test rate it is noteworthy that only 201,000 miles of telephone service would be diverted to LD service and 259,000 miles to WATS.

It is estimated that test rate #4 would result in the loss of 6,591,000 telephone and 342,000 teletypewriter channel miles. It is expected that there would be 1,800,000 telephone miles repressed and 1,139,000 telephone miles diverted to private microwave. The balance, 3,652,000 miles, would be distributed among Bell System private line and common user services with 2,228,000 miles going to LD and 1,292,000 going to WATS.

TOTAL MARKET INTERSTATE PRIVATE LINE MARKET Table 1

MILES (Thousands)

	1969	1971	1971					
	PRESENT	RATES	1	2	3	4	5	6
<u>TELEPAK</u>								
Telephone Channel Miles In Use	33,235	43,284	43,112	44,387	38,263	24,316	43,323	43,092
Teletypewriter Channel Miles Use	6,056	5,940	5,705	6,191	5,212	2,482	5,949	5,929
<u>PRIVATE LINE</u>								
Telephone Airline Miles	4,423	6,784	6,792	6,667	6,908	7,207	6,540	7,255
Teletypewriter Airline Miles	2,563	2,284	2,280	2,274	2,314	2,393	2,214	2,337

Note 1. Totals include telephotograph and 15 pulse telegraph service.
Industry sub totals which follow starting at table 3 do not.

TOTAL MARKET

INTERSTATE PRIVATE LINE REVENUES
ANNUAL DOLLARS (MILLIONS)

Table 2

	1969	1971	1971					
	Present Rates		1	2	3	4	5	6
TELPAK	237.3	310.1	313.4	243.3	356.7	286.8	312.8	305.8
PL TELEPHONE	116.6	160.5	160.7	157.4	163.8	169.9	175.1	148.0
PL TELETYPEWRITER	43.4	42.3	41.9	41.8	42.5	43.4	46.6	36.7
Series 8000	2.6	4.6	4.6	4.6	4.6	4.6	4.6	4.6
Total (Note 1)	399.9	517.5	520.6	447.1	567.6	504.7	539.1	495.1

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Note 1: Totals are before Independent Company settlements.
Does not include telephone and teletypewriter station equipment or special arrangements.
See Market Study Appendix.
Totals include telephotograph and 15 pulse telegraph service.
The industry subtotals which follow starting at Table 3 do not.

Table 3

INTERSTATE TELPAK MARKETTOTAL MARKETMILESTELEPHONE CHANNEL
MILES IN USE (000)1969 1971
PRESENT RATES

	1	2	1971 3	4	5	6
Airlines	6,253	6,744	5,769	0	6,252	6,256
Railroads	761	771	592	291	761	756
Truckers	907	923	738	682	907	907
All Other	19,802	20,385	18,327	13,210	19,839	19,609
SUB TOTAL	27,723	28,823	25,426	14,183	27,759	27,528
Government	15,389	15,564	12,837	10,133	15,564	15,564
TOTAL	43,112	44,387	38,263	24,316	43,323	43,092

TELETYPEWRITER CHANNEL
MILES IN USE (000)

Airlines	2,132	2,477	2,047	0	2,257	2,257
Railroads	358	392	265	110	390	385
Truckers	526	535	504	496	526	526
All Other	1,143	1,206	1,086	849	1,195	1,180
SUB TOTAL	4,159	4,610	3,902	1,455	4,368	4,348
Government	1,546	1,581	1,310	1,027	1,581	1,581
TOTAL	5,705	6,191	5,212	2,482	5,949	5,929

**INTERSTATE TELPAK REVENUES
ANNUAL DOLLARS (MILLIONS)**

MARKET SEGMENTS	1969	PRESENT RATES					1971				
		1	2	3	4	5	6				
Airlines	33.7	36.7	38.6	27.7	50.4	0	36.6	36.7			
Railroads	6.0	8.5	9.2	6.5	9.1	5.6	9.1	8.5			
Truckers	11.8	12.0	13.3	8.9	13.8	15.8	12.0	12.0			
All Others	91.5	171.1	169.0	142.8	191.9	167.2	173.8	166.7			
Government	94.4	82.4	81.4	57.9	92.1	98.9	82.4	82.4			
TOTAL*	237.3	310.1	313.4	243.3	356.7	286.8	312.8	305.8			

* Total may not add because of rounding.

GOVERNMENT INTERSTATE PRIVATE LINE MARKET

SETIM

[illegible]

GOVERNMENTINTERSTATE PRIVATE LINE REVENUES

Table 5

ANNUAL DOLLARS(MILLIONS)

	1969	1971	1971					
	PRESENT	RATES	1	2	3	4	5	6
TELPAC	44.4	82.4	51.4	57.9	92.1	99.0	52.4	82.4
PL TELEPHONE	3.1	3.2	3.2	3.2	3.2	3.2	5.7	2.7
PL TELETYPEWRITER	.6	.6	.6	.6	.6	.6	.7	.5
TOTAL	98.1	86.2	85.2	61.7	95.9	102.8	85.8	85.6

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22
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Table 7

INTERSTATE PRIVATE LINE MARKETAIRLINESMILES

	1969	1971	1971					
	PRESENT	RATES	1	2	3	4	5	6
TELPAK								
Telephone Channel Miles In Use (000)	4,472	6,256	6,253	6,744	5,769	0	6,252	6,256
Teletypewriter Channel Miles In Use (000)	2,415	2,257	2,132	2,477	2,047	0	2,257	2,257
PRIVATE LINE								
Telephone Airline Miles	41,050	31,640	31,640	30,490	29,790	0	28,170	31,640
Teletypewriter Airline Miles	9,690	6,770	6,770	6,770	6,770	0	6,770	6,770

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Table 8

INTERSTATE PRIVATE LINE REVENUESANNUAL DOLLARS (MILLIONS)AIRLINES

	1969	1971	1971					
	Present Rates		1	2	3	4	5	6
TELPAK	33.7	36.7	38.6	27.7	50.4	0	36.6	36.7
PL TELEPHONE	1.6	1.1	1.1	1.0	1.0	0	1.1	.9
PL TELETYPEWRITER	.4	.4	.4	.4	.4	0	.4	.3
TOTAL	35.7	38.2	40.1	29.1	51.8	0	38.1	37.9

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RAILROADS INTERSTATE PRIVATE LINE MARKET Table 9

MILES

	1969	1971	1971					
	PRESENT	RATES	1	2	3	4	5	6
TELPAK								
Telephone Channel Miles In Use (000)	535	756	761	771	592	291	761	756
Teletypewriter Channel Miles In Use (000)	357	385	358	392	265	110	390	385
PRIVATE LINE								
Telephone Airline Miles	32,790	47,680	47,680	47,680	44,050	50,250	41,310	47,580
Teletypewriter Airline Miles	46,510	49,820	49,820	49,820	49,820	49,820	49,820	49,820

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INTERSTATE PRIVATE LINE REVENUES

Table 1

RAILROADS

ANNUAL DOLLARS (MILLIONS)

	1969	1971	1971					
	Present Rates		1	2	3	4	5	6
TELPAX	6.0	8.5	9.2	6.5	9.1	5.6	9.1	8.5
PL TELEPHONE	1.4	1.8	1.8	1.8	1.6	1.8	1.8	1.5
PL TELETYPEWRITER	1.2	1.2	1.2	1.2	1.2	1.9	1.4	1.1
TOTAL	8.6	11.5	12.2	9.5	11.9	9.3	12.3	11.1

TRUCKERS INTERSTATE PRIVATE LINE MARKET Table 11

MILES

	1969	1971	1971					
	PRESENT	RATES	1	2	3	4	5	6
TELEPHONE CHANNEL MILES IN USE (000)			907	923	738	682	977	977
TELETYPEWRITER CHANNEL MILES IN USE (000)	749	907	526	535	504	496	526	526
PRIVATE LINE	556	526						
TELEPHONE AIRLINE MILES	71,520	98,990	98,990	99,170	76,030	55,810	98,990	98,990
TELETYPEWRITER AIRLINE MILES	19,320	18,350	18,350	18,350	18,350	18,350	18,350	18,350

INTERSTATE PRIVATE LINE REVENUE

Table 12

ANNUAL DOLLARS (MILLIONS)

TRUCKERS

	1969	1971	1971					
	Present Rates	1	2	3	4	5	6	
TELPAK	11.8	12.0	13.3	8.9	13.8	15.8	12.0	12.0
PL TELEPHONE	3.9	3.3	3.3	3.3	2.6	1.9	3.8	2.8
PL TELETYPEWRITER	.5	.5	.5	.5	.5	.5	.6	.4
TOTAL	16.2	15.8	17.1	12.7	16.9	17.2	16.4	15.2

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Table 13

INTERSTATE PRIVATE LINE MARKETALL OTHERMILES (thousands)

	1969	1971	1971					
	PRESENT	RATES	1	2	3	4	5	6
TELEPAK								
Telephone Channel Miles In Use	11,027	19,801	19,802	20,385	18,327	13,210	19,839	19,609
Teletypewriter Channel Miles In Use	1,054	1,191	1,143	1,206	1,086	849	1,195	1,180
PRIVATE LINE								324
Telephone Airline Miles	4,139	6,516	6,523	6,399	6,668	7,009	6,281	6,987
Teletypewriter Airline Miles	2,408	2,180	2,176	2,170	2,212	2,261	2,111	2,233



ALL OTHERINTERSTATE PRIVATE LINE REVENUES

Table 14

ANNUAL DOLLARS (MILLIONS)

	1969	1971	1971			
	PRESENT	RATES	1	2	3	4
TELPAC	91.5	171.1	169.0	142.8	191.9	167.2
PL TELEPHONE	106.6	149.1	149.2	146.0	153.4	160.9
PL TELETYPEWRITER	40.7	38.0	38.0	37.9	38.6	39.0
TOTAL	238.8	358.2	356.2	326.7	383.9	367.1

166.7

173.8

162.4

138.3

33.3

338.3

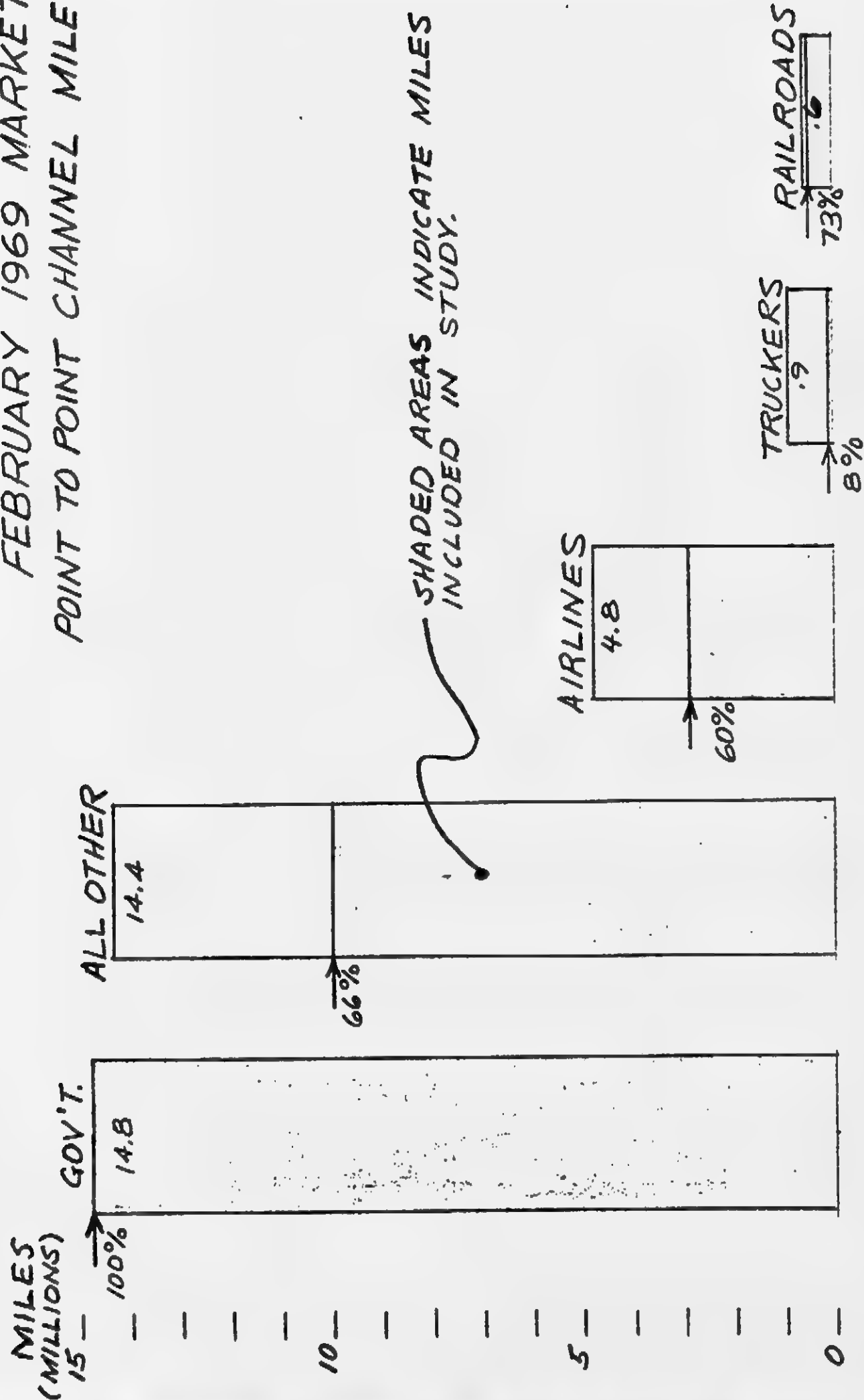
PROFILE OF EXISTING MARKET

The accounts selected for study were drawn from the February 1969 inventory of Bell System interstate private line customers. The characteristics of the market as represented by this inventory are listed below and shown on the following charts.

<u>CUSTOMERS WITH MORE THAN 500 CHANNEL MILES</u>	<u>CUSTOMERS</u>	<u>PT. TO PT. CHANNEL MILES*</u>
Airlines	62	4,789,000
Truckers	329	892,000
Railroads	35	614,000
Government	1	14,834,000
All Other	<u>1350</u>	14,387,000
SUB TOTAL	1777	35,516,000
 <u>CUSTOMERS WITH LESS THAN 500 CHANNEL MILES</u>	 17,923	 1,011,000
TOTAL	19,700	36,527,000

* Channel miles equal total point to point telephone miles plus one half point to point teletypewriter miles.

CHART 1

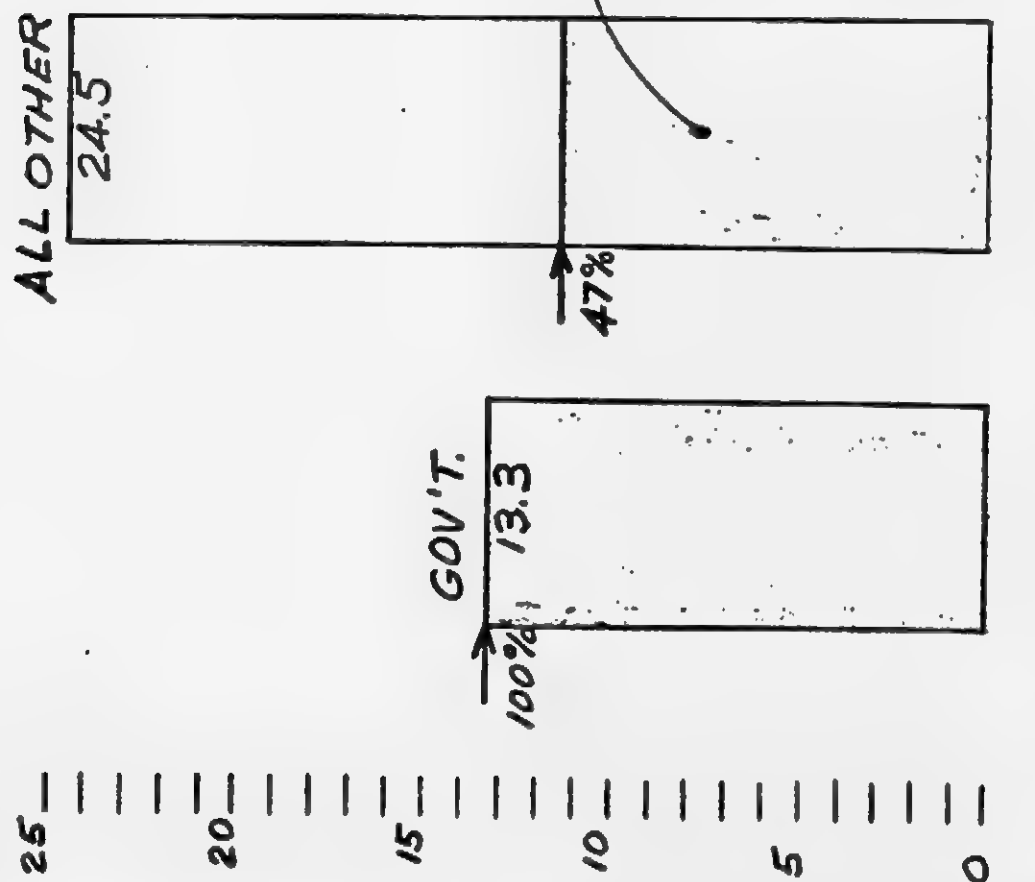
FEBRUARY 1969 MARKET
POINT TO POINT CHANNEL MILES*

* CHANNEL MILES EQUAL TOTAL POINT TO POINT TELEPHONE MILES PLUS ONE HALF POINT TO POINT TELETYPEWRITER MILES.

CHART 2

FEBRUARY 1969 MARKET
MONTHLY INTERSTATE PRIVATE
LINE REVENUES

MONTHLY REVENUE
DOLLARS
(MILLIONS)



SHADED AREAS INDICATE
REVENUE VALUE OF SERVICES
INCLUDED IN STUDY

Selection Method, Evaluation Method,
and Reasons for Using PPS *Procedure

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The following sampling methodology which was used for the study was prepared by Long Lines statistical personnel:

I. Method of Selecting Study Accounts

- A. A total of 100 accounts plus the Federal Government will be selected in the study. These study accounts will be chosen from the following strata:

<u>Stratum</u>	<u>No. of Selected Accounts</u>
1. Government	All
2. Airlines	10
3. Railroads	5
4. Truckers	10
5. All Others	75

- B. The strata sample sizes are based upon three primary factors:

1. The number of equivalent miles and revenue of the stratum members in relation to the total market.
2. The expected degree of variability of responses from the various individual accounts within each stratum.
3. The number of customers in each stratum.

- C. To describe the sample selection procedures in proper detail, it is necessary to make the following definitions:

1. Y_{ij} = The characteristic of interest for the i th account in the j th stratum.
2. M_{ij} = The measure of size (total number of equivalent miles) for the i th account in the j th stratum.

- C. 3. N_j = The number of accounts in the jth stratum.
4. $M_j = \sum_{i=1}^{N_j} M_{ij}$. The total number of equivalent miles in the jth stratum.
5. n_j = The number of accounts in the sample from the jth stratum.
6. L = Total number of strata.
7. $Y = \sum_{j=1}^L \sum_{i=1}^{N_j} Y_{ij}$. Total characteristic of interest.
8. $\bar{M}_j = \frac{M_j}{n_j}$ The sampling interval for the jth stratum.
- D. Certain universe accounts will be placed in a census group. This means that their characteristics will not be expanded to estimate universe values. Other universe accounts will be placed in a sample group and will be expanded by the inverse of their probability of selection.
- E. The general sampling procedure will be performed in two stages by stratum. The number of accounts to be placed in a census group will be first determined. Then, the rest of the accounts will be scientifically sampled. There are four primary steps in determining the number of census accounts in each stratum:
1. The sampling interval \bar{M}_j will be determined for each stratum.
 2. The accounts whose number of equivalent miles (M_{ij}) is greater than \bar{M}_j in each stratum will be placed in a census group.
 3. A new M'_j will be recomputed in each stratum leaving out those accounts already selected in the census

- E. group. The remaining number of accounts required in the stratum $n'_j = n_j - c_j$ (where c_j = those accounts selected in the census group) is calculated. Steps 1 and 2 are then retraced, and $\bar{M}'_j = M'_j / n'_j$ is tested for new census entries.
4. When M_{1j} is less than \bar{M}'_j for each account in the jth stratum, the remaining accounts required in that stratum will be selected using a sampling procedure call Probability Proportionate to Size.
- F. Let us assume for the sake of simplicity that M'_j represents the number of equivalent miles of the accounts in each stratum after census groups have been removed. Also, let's assume n'_j is the number of sample accounts in the jth stratum which remain to be selected after the census groups have been chosen. The following steps will be used to select the remaining accounts:
1. The equivalent miles (M_{1j}) of the remaining accounts will be accumulated by stratum and listed next to the account. A typical listing of the remaining accounts of Stratum 1 might look as follows:

<u>Company</u>	<u>No. of Equivalent Miles</u>	<u>Cum. Equivalent Miles</u>
A_1	21,340	1-21,340
A_2	12,692	21,341-34,032
A_3	11,483	34,033-45,515
\vdots	\vdots	\vdots
\vdots	\vdots	\vdots
\vdots	\vdots	\vdots
$A_{N'_1}$	506	$(M'_1 - 505) - M'_1$

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- F. 2. One random number (R_j) between 1 and \bar{M}_j' will be selected in each stratum. A series of n_j' numbers will be calculated by adding multiples of \bar{M}_j' to R_j . These numbers will be:

$$\begin{aligned} R_j \\ R_j + 1\bar{M}_j' \\ R_j + 2\bar{M}_j' \end{aligned}$$

$$R_j + (n_j' - 1)\bar{M}_j'$$

in each stratum. They will be compared with the above accumulated listings. Accounts associated with these numbers will be selected for investigation.

For example, suppose $R_1 = 296$, $\bar{M}_1' = 22143$ and the chart in F.1. is the listing for Stratum 1. The numbers 296, 22439, 44582, - - - are compared to the listing, and accounts associated with these cum. equiv. miles are chosen in the sample. Consequently, accounts A_1 , A_2 , and A_3 are three of the accounts selected.

3. It should be noted that each non-census account in the j th stratum has M_{ij}/M_j' chance of being selected. Hence, the probability that any particular account will be selected is proportionate to its size.

II. Method of Evaluating Study Accounts

- A. Mathematical terms used in this section have been defined in the previous section - "Method of Selecting Study Accounts".
- B. It might appear, at first, that selecting accounts with probability proportionate to their size would bias sample results. After all, the larger accounts have a much greater chance of being selected in the sample than the smaller ones. This would be the case if no special attention was given to the estimating procedures.

In both estimates of total characteristic values and sampling errors, expansion factors (M'_j/M_{1j}) eliminate the selection problem. If we define Z'_j to be the total characteristic values of census accounts in the jth stratum, then:

1. An estimate of the characteristic total (Y) is:

$$\hat{Y} = \sum_{j=1}^L \left[Z'_j + \frac{M'_j}{n'_j} \sum_{i=1}^{n'_j} \frac{Y_{ij}}{M_{ij}} \right]$$

This is an unbiased estimate of Y .

2. The variance ($V(\hat{Y})$) is (approximately):

$$V(\hat{Y}) = \sum_{j=1}^L \frac{1}{n'_j} \left[\sum_{i=1}^{n'_j} \left(\frac{M_{ij}}{M'_j} \right) \left(\frac{(M'_j)(Y_{ij})}{M_{ij}} - Y \right)^2 \right]$$

3. An estimate of the approximate variance ($v(\hat{Y})$) is:

$$v(\hat{Y}) = \sum_{j=1}^L \frac{1}{n'_j} \left[\sum_{i=1}^{n'_j} \left(\frac{(M'_j)(Y_{ij})}{M_{ij}} - \hat{Y} \right)^2 \right]$$

4. The variance estimate $v(\hat{Y})$ is used to determine the quality of Y . It is needed to compute the possible sampling error associated with our estimate of Y .

III. Reasons for Using a Selection Procedure based on Probabilities of Selection Proportionate to Size

A. There are two fundamental reasons for establishing a census group.

1. The variance of the sample group is expected to be lower than it would have been if this census group of accounts were included. Characteristics of the very large accounts are quite different from those of the small accounts.
2. The 1969 list of private line accounts is not yet available. To start training as scheduled, a number of accounts were needed earlier in the month. The census group was selected from the 1967 list of private line accounts and will contain most of the census accounts found in the 1969 list. Additional accounts will be selected from the 1969 listings if necessary.

B. The following are reasons for using PPS sampling:

1. The costs of investigating large accounts is not proportionally higher than the costs of investigating small accounts.
2. The characteristics of interest (revenues, terminals, miles) are correlated quite closely with total equivalent miles. Thus, as the size of accounts increase, so do their characteristics of interest.
3. Many of the larger accounts are industry leaders. Their actions influence the market. It is important to know how they are going to react to rate changes.

THE MARKET STUDY TECHNIQUE

Account Managers Selected for Customer Analysis

In order to get the best available market data we called upon the experience and judgement of Bell System account managers who serve the customers selected for study.

The term account manager as used in this report describes a Bell System manager, group of managers, or staff headed by an account manager, who has direct responsibility for sales and servicing of the private line customer under study.

In general the plane on which the account manager works with a customer could aptly be defined by the term Communications Consultant. The typical account manager has a broad background of Bell System work experience and a considerable knowledge of communications systems applications. He is knowledgeable about the functions of business in general and has a particularly thorough understanding of the operations of the customer whom he serves and the industry of which his customer is a part. He has the latitude to call upon the resources of the Bell System to provide services to best fit his customer's needs. He is responsible for delving into the customer's operations sufficiently so that he not only gains a thorough knowledge of the customer's operations, but can recommend Bell System communications to increase customer efficiency, lower operating costs,

increase sales, help expand markets, increase profit, and so forth. A natural product of such activity is a close rapport with the customer and a genuine understanding of how our communications services are utilized by the customer.

The larger accounts often use highly complex communications systems which require constant supervision by both Bell System personnel and customer communications staffs. Much joint planning is done to coordinate installations, expansions and changes in such systems. Over a period of time the account manager becomes familiar with the future plans of his customer which involve communications. He also acquires a "feel" for the relative costs (from the customer's viewpoint) of communication alternatives. In addition he develops a sense for what the customer's response may logically be to different rate levels for his communications. This, we feel, eminently qualifies the account manager to anticipate his customer's response to varying private line rate schedules as called for in this market study.

Account Manager Training

All account managers attended a one-day training meeting where the objectives of the study were outlined and thorough instructions given for furnishing the

necessary data and documentation.

Study Procedures for Account Managers

Due to the broad scope of this market study and its complexity, detailed procedures for developing the type of numerical documentary and narrative data required were prepared for the guidance of the account manager. Discussion with outside consultants, members of the F.C.C. Common Carrier Bureau Staff, and interested parties in Phase 1B of Docket No. 16258 preceded the finalizing of the procedures and forms used in this study. Semi-final versions were pre-tested by a sample of five account managers. Minor final modifications were then made for clarity and to enhance the validity and accuracy of analysis. The Appendix contains a copy of these procedures.

In summary, the procedures called for the account manager completing three steps.

Step One

The first step was to prepare background information on the customer's operations. Here the account manager was to thoroughly describe his customer's current business operations, how they had changed over the last five years, and how the customer's communications systems had changed in relation to the changes in operations.

In addition the account manager was asked to answer nine specific questions about the customer. The objective of the questions was to show the depth of the account manager's knowledge of his account (adding credence to his estimates) as well as probe for additional useful information for analysis purposes in this and future studies.

The questions were aimed toward obtaining information on the relative importance of communications systems to customer operations; the factors which cause changes in his systems; the effect of Telpak on the customer; ratios of communications expenses to customer operating expense; customer controls on cost and use; growth of his private line usage in the last five years; any use of competitive systems; and a recent breakdown of customer expenditures on LD, WATS and TWX.

Step Two

The second step required the account manager to estimate his customer's interstate private line usage at the end of 1971 assuming all present rates and regulations for other Bell System interstate services and the present growth rate of the nation's economy remain constant through that date. This period of approximately three years (February 1969 through December 1971) was judged to be a reasonable test period to allow some time for a customer to make long-run decisions in light of different rates, plus allow time for the majority of the

adaptation to any alternative communication systems resulting from such decisions. The account manager was to record his projections on the data forms provided.

Detailed written support was required for any changes in usage he estimated. He had to explain his reasoning and all factors which affected the estimates, such as:

- growth trends in calls, messages, circuits, revenue, etc.
- expansion plans
- centralizing/decentralizing of the firm
- anticipated mergers and reorganizations
- new communications usage he planned to sell
- customer business indicators (e.g. forecasts of passenger loadings, ton miles, market volumes, defense contracts.)
- economic indicators
- competition
- budget procedure

Step Three

The third step was to project his customer's response to each of the six different test rate schedules.

The account manager estimated the customer's usage in terms of market parameters, i.e., Telpak section miles, service terminals, private line airline miles and service terminals, etc., under each test rate. He was to make his estimates considering two time situations:

1. Estimated usage, in service, by the end of 1971.
2. Estimated usage at the end of a later year if in his judgement the customer would decide to change his communications systems, but could not completely adapt to the substitute systems until

after the end of 1971. This was required to help measure the long-run effect on the customer's usage of Bell System services which would be prompted by changes in rates.

Shifts, Repression and Stimulation

Step three also required the account manager to estimate under each rate the shifts among Bell System interstate services and between Bell System private line services and competitive services, particularly private microwave communications systems. He was further required to estimate the amounts of private line services which may be stimulated or repressed under each test rate schedule. These estimates were in terms of channel miles of the service as shown in the forms.

Again, detailed written support was called for under any test rate where estimates of customer usage differed from that estimated at present rates.

Reference Information Furnished Account Managers

Supplementary reference material was furnished to each account manager.

Data on the total interstate private line usage were provided on each customer as of March 1964, July 1966, October 1967, and February 1969.

A reprice of the customer's February 1969 inventory at each test rate was given as an indicator of the

possible range of economic impact.

The account managers were also furnished for general guidance purposes some tables showing economic crossing points of Telpak and private line services at each of the test rates.

Data Forms for Estimating Customer Usage

Five data forms were provided to the account manager on which to record estimates of customer usage. The Appendix contains copies of the forms along with the detailed instructions for their completion.

Form 1 - Total Interstate Telpak Market (Series 5000)

This form was designed for recording customer usage of Telpak in terms of market parameters as required in completing Steps 2 and 3. Sections 1-3 on the form provided information on Telpak IXC (base capacity), Telpak Service Terminals, and Telpak Connecting Arrangements. Sections A-C provided estimates of telephone and teletype-writer channel miles in use which would be shifted to or from other Bell Services, shifted to or from competitive services, and repressed or stimulated under each of the rates.

Form 2- Total Interstate Private Line Telephone Market
(Series 2000, 3000, and 4000)

Form 3 - Total Interstate Private Line 60/75 Speed
Teletypewriter Market (Series 1000-Type 1002)

Form 4 - Total Interstate Private Line 100 Speed
Teletypewriter Market (Series 1000-Type 1005)

Form 5 - Total Interstate Private Line 150 Baud
Teletypewriter Market (Series 1000-Type 1006)

These forms were designed for recording customer usage in terms of market parameters for each service as required in the completion of Steps 2 and 3. The upper section of the forms provided information on usage of channels in ten mileage bands, plus estimates of service terminal usage. The lower section of the forms provided information on shifts and repressed or stimulated demand in terms of total airline miles affected.

Industry Specialists' Participation

There are men on the marketing staffs of A. T. & T. and Long Lines who serve as the sales and marketing specialists for certain specific industries. These men are charged with maintaining industry-wide contacts and developing information relating to the communications needs of the industry with which they work. Their depth of knowledge on an industry-wide basis enables them to make an especially valuable contribution in a study such as this where, in certain situations, it is important to consider the response of an industry as well as individual customers.

The industry specialists for the airlines, truckers, and railroads participated in this study since these industries are users of shared Telpak. Their first task was to thoroughly review all of the account managers' statistical and narrative material relating to individual accounts within the three industry groups. The objective of these reviews was to become familiar with the market estimates made by the individual account managers and to evaluate the reasonableness of the estimates. The reasoning behind the estimates was tested to see if there were any substantial deviations from industry trends. In cases where there were deviations, or where there was inadequate support for a questionable estimate, the account manager was contacted and the problem resolved. This might be considered phase one of the industry specialists' participation.

Phase two took place after the data obtained from the account managers was summarized and industry-wide views of responses to the test rates were available. At this time the industry specialists met with the Long Lines General Marketing Manager and members of the market studies staff to examine the industry results. After thorough discussions of the reasonableness of the summary results, the decision was made as to whether or not the forecast data should be accepted or modified. The role of the industry specialists in these discussions was as an expert consultant. Since some of the alternatives

available to customers depended on industry-wide co-operative action the industry specialist was in a position in some cases to have a more clear view of the alternative action that might be taken by an industry in concert than would the individual account managers.

Two of the market segments, "Government" and "All Other" were not represented by industry specialists. In the case of the government, there is no industry specialist as such, and the people responsible for the results were as familiar with the communications needs and reasonableness of possible responses for their customer as an industry specialist would be. The consultations therefore took place directly between the responsible field personnel and the marketing staff.

The "All Other" segment, having no industry specialist, was evaluated by the marketing staff. Since this is such a diverse group of customers it was not reasonable to measure the individual responses against a group trend. Rather, each set of data for individual accounts was examined for reasonableness based on the documentation of the account managers and the knowledge of the marketing staff about the customers.

INDUSTRY ANALYSIS

Airlines

In order to determine the anticipated future use of communications for the airlines industry under the six test rate schedules, analysis from ten airlines Account Managers was obtained. The selection methods of these accounts and the technique of expansion to total industry are explained in Tab 5. The expanded market information was then reviewed by Industry Specialists and Headquarters Marketing personnel as described in Tab 6.

The expanded volumes determined by the Industry Specialists differ from the industry market based on Account Managers' views only at test rate #4, where the Telpak D rate was increased to \$115 per month. This change was based on our opinion that the airlines as an industry would establish a PMW system at this higher rate. The evaluation was based on the following analysis.

ARINC has previously placed in evidence, information concerning a nationwide microwave system. We have had Page Engineering study this ARINC proposal and prepare a similar microwave review. In order to compare Telpak rates with our view of a range of annual PMW costs, we have taken the expanded (estimated ARINC 1975 volumes) point-to-point data and reconfigured a combined airlines Telpak network using the 30/85/35 rate plan. The results of this extensive effort

indicate that the annual charges for Telpak base capacity for such a system would fall within the range of estimated PMW costs. It was the opinion of those reviewing this information that in these circumstances the airlines would not elect the alternative of a major PMW system. First, the 30/85/35 rate schedule produces common carrier charges which are within the range of PMW costs for a comparable system. In the absence of a significant PMW cost advantage, the flexibility and dependability of common carrier services makes it unlikely that the airlines would elect the PMW alternative.

However, at Telpak test rate #4, the average equated charge per mile per month (base capacity only) seems to be above the range of PMW costs for a large system such as proposed by ARINC. The Industry Specialists weighing the effects on the airlines of this cost differential in combination with non cost factors made the judgment that the airlines industry would move to private microwave from interstate Telpak. It should be noted that under test rate #4, as shown in Tab 3 that no Bell System interstate private line service will be provided the airlines.

Railroads

A private line market analysis was carried out on five major railroads by the Account Managers handling these

customers. These volumes were expanded to represent the entire railroad industry in accordance with procedure set forth in Tab 5. The Industry Specialists and Headquarters Marketing personnel reviewed this material looking at this industry as a total Telpak sharing group in order to determine whether or not modification of these markets was appropriate. It was their judgment that the market based on the Account Managers' analysis accurately reflects the railroad industry's future communications volumes.

Truckers

Ten trucking companies' communications were analyzed by Account Managers and the anticipated volumes at varying test rates expanded to industry totals. A review of this industry, as a combined Telpak sharing group was made by Industry Specialists and Headquarters Marketing personnel. It was determined that there was no reason to make changes in the Account Managers' expanded totals.

Government and Other Industrial Customers

The Account Managers' analyses, without special industry review, formed the basis for the market totals for these two market segments.

September 29, 1969

LONG-RUN INCREMENTAL COST ANALYSES OF TELPAK,
PRIVATE LINE TELEPHONE, AND
PRIVATE LINE TELEGRAPH SERVICES

The results of studies of long-run incremental costs (LRIC) undertaken for the Telpak, private line telephone grade, and private line telegraph grade services are shown in the following attachments.

Attachment A is a summary showing a comparison of incremental revenues and LRIC under the alternative rate schedules studied for the Telpak category (test schedule nos. 1 through 4). The market study of the four Telpak test rates resulted in estimates of the market effect of these rate alternatives on the amount of service to be furnished as of the end of 1971. The differences between quantities of service in the 1971 market under existing rates and quantities under the test rates provided the basis for the incremental revenue and cost calculations summarized in the attachment. The market study included an analysis of the effect that these Telpak test rate schedules would have on the quantities of other interstate services provided by the Bell System (other private line services, MTT, WATS and TWX). Accordingly, the cost analyses included a determination of the LRIC applicable to the changes in quantities of the other services that would be affected by the Telpak rate changes.

Attachment B is a summary of a similar analysis of incremental revenues and LRIC for the two rate alternatives studied for the private line telephone and telegraph services (test schedule nos. 5 and 6). The attachment shows the results of an analysis of the LRIC applicable to the changes in market quantities estimated as of the end of 1971 for the private line services and other Bell System interstate services that would be affected by the rate changes studied.

Attachment C is a summary of the results obtained when incremental unit costs are multiplied by the entire end-of-1971 estimated market quantities for Telpak under the (a) original rates for Telpak C and D (test schedule no. 2), (b) the present rates for Telpak C and D (the interim rates which became effective September 1, 1968), and (c) the rates for Telpak C and D to be filed with an effective date of November 1, 1969 (test schedule no. 3). The unit incremental costs that are applied to these market quantities are those that were developed for the purpose of the incremental cost-revenue analyses summarized in Attachments A and B. Page 2 of Attachment C shows a breakdown of these amounts among Telpak C line haul (base capacity), Telpak D line haul (base capacity) and service terminals. It should be noted that any cost breakdown between line haul and terminal is at best an approximation. Because of the integrated nature of the Telpak

systems and the interaction of cost elements as between line haul and terminal, it is not practicable to isolate each cost element and attribute its incurrence specifically to either the line haul or the service terminal.

The LRIC determinations for the analyses summarized in Attachments A through C include an amount for return on investment at an $8\frac{1}{2}$ percent rate. Federal income taxes are included at a 48 percent rate. The computation of the incremental costs for the interexchange high frequency line haul facilities reflect an assumption of higher than straight-line depreciation requirements in the early years of the life of the equipment. The applicable depreciation reserves for all plant have been calculated on the basis of a five-year planning period.

TELPAKSummary Comparison of Incremental Revenues and Long Run
Incremental Costs Under Rate Alternatives(Estimated End-of-1971 Market)
(Thousands of Dollars)

	Telpak Test Schedules			
	1	2	3	4
<u>Effect on Telpak</u>				
{1} Incremental Revenues	3,400	(67,100)	47,800	(18,900)
{2} Long Run Incremental Costs	(2,700)	9,200	(36,100)	(134,500)
{3} Net Effect (line 1 minus line 2)	6,100	(76,300)	83,900	115,600
<u>Effect on Other Private Line Services</u>				
{4} Incremental Revenues	(1,400)	(1,400)	(3,900)	(19,700)
{5} Long Run Incremental Costs	{1,200}	{300}	{5,000}	{26,100}
{6} Net Effect (line 4 minus line 5)	(200)	(1,100)	1,100	6,400
<u>Effect on Other Services (MTT, WATS, TWX)</u>				
{7} Incremental Revenues	0	{300}	9,400	39,200
{8} Long Run Incremental Costs	0	{200}	6,000	24,700
{9} Net Effect (line 7 minus line 8)	0	(100)	3,400	14,500
Total Net Effect (Sum of lines 3, 6 and 9)	5,900	(77,500)	88,400	136,500

() Denotes negative amount

PRIVATE LINE TELEPHONE AND TELEGRAPH GRADE SERVICES

Summary Comparison of Incremental Revenues and Long Run
Incremental Costs Under Rate Alternatives

(Estimated End-of-1971 Market)

(Thousands of Dollars)

	<u>Private Line Test Schedules</u>	
	<u>5</u>	<u>6</u>
<u>Effect on Private Line Telephone Grade Services</u>		
{1} Incremental Revenues	13,500	(11,800)
{2} Long Run Incremental Costs	(8,100)	11,200
{3} Net Effect (line 1 minus line 2)	<u>21,600</u>	<u>(23,000)</u>
<u>Effect on Private Line Telegraph Grade Services</u>		
{4} Incremental Revenues	2,100	(3,900)
{5} Long Run Incremental Costs	(4,000)	2,900
{6} Net Effect (line 4 minus line 5)	<u>6,100</u>	<u>(6,800)</u>
<u>Effect on Telpak</u>		
{7} Incremental Revenues	2,600	(4,100)
{8} Long Run Incremental Costs	1,100	(4,500)
{9} Net Effect (line 7 minus line 8)	<u>1,500</u>	<u>400</u>
<u>Effect on Other Services (MTT & WATS)</u>		
{10} Incremental Revenues	3,500	(3,000)
{11} Long Run Incremental Costs	2,200	(1,900)
{12} Net Effect (line 10 minus line 11)	<u>1,300</u>	<u>(1,100)</u>
Total Net Effect (Sum of lines 3, 6, 9 and 12)	<u>30,500</u>	<u>(30,500)</u>

() Denotes negative amount

September 1969

TELPAKSUMMARY OF INCREMENTAL UNIT COSTS APPLIED TO
TOTAL ESTIMATED END-OF-1971 MARKET QUANTITIES

(Thousands of Dollars)

<u>Telpak Rate Level</u>	<u>Estimated Revenues</u>	<u>Application of Unit Costs to Total Market Quantities</u>
Originally filed Telpak C and D rates	233,700	308,700
Interim rates for Telpak C and D that became effec- tive September 1, 1968	300,800	299,500
Rates for Telpak C and D filed to be effective November 1, 1969	348,600	263,400

September 1969

TELPAC

Summary of Incremental Unit Costs
Applied to Total Estimated End-of-1971 Market Quantities

(Thousands of Dollars)

<u>TELPAC Rate Level</u>	<u>Line Haul</u>		<u>Terminals</u>	<u>Total</u>
	<u>TELPAC C</u>	<u>TELPAC D</u>		
Originally Filed TELPAK C and D Rates	36,200	102,000	170,500	308,700
Interim Rates for TELPAK C and D that became effective September 1, 1968	42,300	93,000	164,200	299,500
Rates for TELPAK C and D filed to be effective November 1, 1969	39,800	79,900	143,700	263,400

33
51
11

September 1969

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

RECEIVED

JUL 16 1970

CLERK OF THE UNITED
STATES COURT OF APPEALS

Nos. 23,833, 23,836, 23,839,
23,841, 23,842, 23,843

FILED JUL 16 1970

THE ASSOCIATED PRESS,
AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA,
AIR TRANSPORT ASSOCIATION OF AMERICA, *et al*
AMERICAN TRUCKING ASSOCIATIONS, INC.,
AERONAUTICAL RADIO, INC., and
NATIONAL ASSOCIATION OF MOTOR BUS OWNERS,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents,

AMERICAN TELEPHONE AND TELEGRAPH COMPANY and
THE WESTERN UNION TELEGRAPH COMPANY,

Intervenors.

On Petitions to Review Orders of
The Federal Communications Commission

WILNER, SCHEINER & GREELEY
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Washington, D. C. 20036

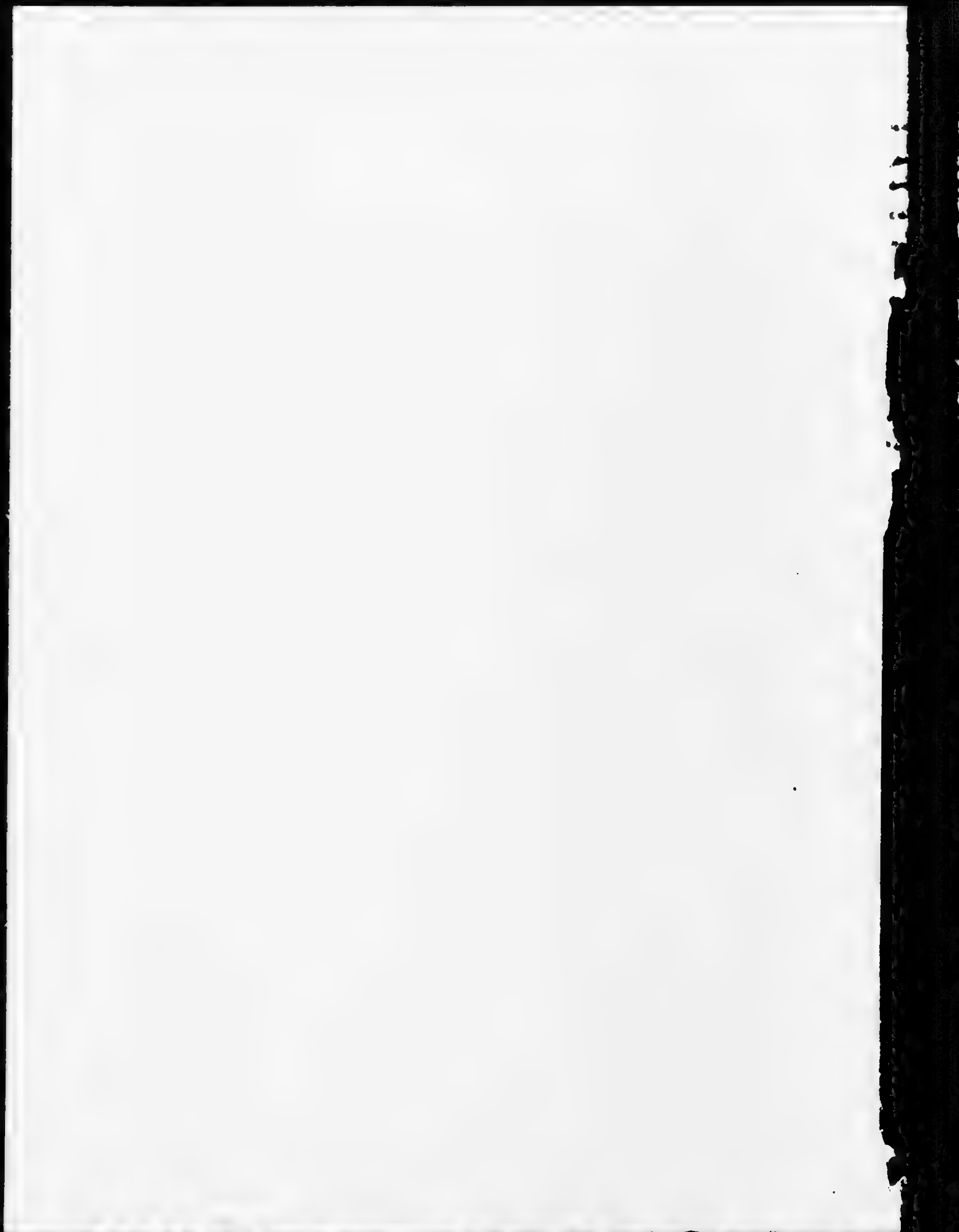
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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

In the Matter of
AMERICAN TELEPHONE AND TELEGRAPH
COMPANY
Revisions of Tariff FCC No. 260,
Private Line Service Series 5000
(TELPAK)
(The revised pages are set forth on
711th Revised Page 1)

AT&T Transmittal No. 10609

Docket No.

PETITION OF THE SECRETARY OF DEFENSE
ON BEHALF OF
ALL EXECUTIVE AGENCIES OF THE UNITED STATES
TO REJECT OR REQUIRE WITHDRAWAL OF
PROPOSED INCREASES IN TELPAK RATES

Comes now the Secretary of Defense, through duly authorized counsel, on behalf of all Executive Agencies of the United States, and files the following Petition to reject or require withdrawal of The American Telephone and Telegraph Company's (hereinafter referred to as AT&T) proposed increases in TELPAK rates filed on 1 October 1969 to become effective on 1 November 1969.

The Executive Agencies of the United States are by far the largest users of TELPAK service in the United States. The current monthly cost to the Executive Agencies for TELPAK service exceeds \$8,769,800.00 or \$105,237,500.00 per year.

AT&T by letter of Transmittal No. 10609 to the Federal Communications Commission, dated 1 October 1969, filed proposed increases in rates for TELPAK C and D service to be effective on 1 November 1969. The proposed revised increased rates are set forth in AT&T's Tariff FCC No. 260 on the pages indicated on 711th Revised Page 1. The proposed increases will raise the cost to the Executive Agencies for TELPAK service by more than \$44,313,500.00 annually over the increased TELPAK rates effective on 1 September 1968 to a total annual bill of \$149,551,000.00. The annual increase to the Government is \$81,114,500.00 more than the rates in effect prior to 1 September 1968. The proposed increases to the Government are approximately 118 percent over the rates in effect prior to 1 September 1968 and 52 percent over the rates effective 1 September 1968, which are now under investigation and subject to an accounting order.

Neither the tariff, the letter of transmittal, nor the supporting papers show any justification whatsoever for such an exorbitant increase in TELPAK rates at this time. In fact there has been absolutely no showing of a need to increase TELPAK rates to any extent. The Executive Agencies believe that an investigation of the proposed increased rates will demonstrate that they are unjust, unreasonable, and otherwise unlawful. Further, it is believed that the proposed TELPAK rates are based

on a totally inadequate and faulty basis. For example, in its long run incremental cost studies AT&T set forth revenue and communications service projections for the Federal Government, without consulting the Federal Government as to accuracy or as to future plans and requirements.

To allow AT&T to file additional increases in TELPAK rates while an investigation into the justness and reasonableness of its current increase in TELPAK rates is in progress and an accounting order is in effect is clearly contrary to the public interest and would be a brazen mockery of effective rate regulation. If such unjust action is sanctioned, AT&T could completely avert the effect of all accounting orders and investigations of its rates for individual services by merely filing new tariff schedules before an investigation of its current rate increase is concluded. A suspension and accounting order is not adequate protection for customers in situations where repeated new rate schedules are filed. In such instances an accounting order serves no purpose since it is, in effect, cancelled out by each new filing, because no investigation of the rate to which it applies is ever held. Further, an accounting order is no help whatsoever when an increase is of such magnitude, such as the 1 October 1969 TELPAK filing, that a customer is forced to cancel much of its needed communications service.

If AT&T is allowed to file new rates under the circumstances that are now pending as to TELPAK, it will clearly thwart the regulatory processes.

In addition to the reasons set forth above, the public and National Defense interest require the Commission to either reject AT&T's filing at this time or to compel AT&T to withdraw the filing. The Executive Agencies do not have funds available to meet the \$44,313,500.00 annual increase over the rates effective on 1 September 1968, and now subject to an investigation and accounting order, required by the proposed rates. An accounting order would not be appropriate since it would require the expenditure of funds that do not exist and even if the funds were available, which they are not, would be virtually impossible to administer due to the thousands of TELPAK service changes monthly. Further, as pointed out before herein, an accounting order can be averted by allowing AT&T to file new rates before an investigation is completed such as it is attempting to do here. The only alternative to a rejection of filing or a withdrawal of the proposed increases is a drastic decrease or cut-back in the amount of vital communications the Department of Defense and the other Executive Agencies are now receiving which would obviously be extremely detrimental to the national security. Clearly the public interest and necessity

require the rejection for filing or withdrawal of the proposed increased TELPAK rates at this time.

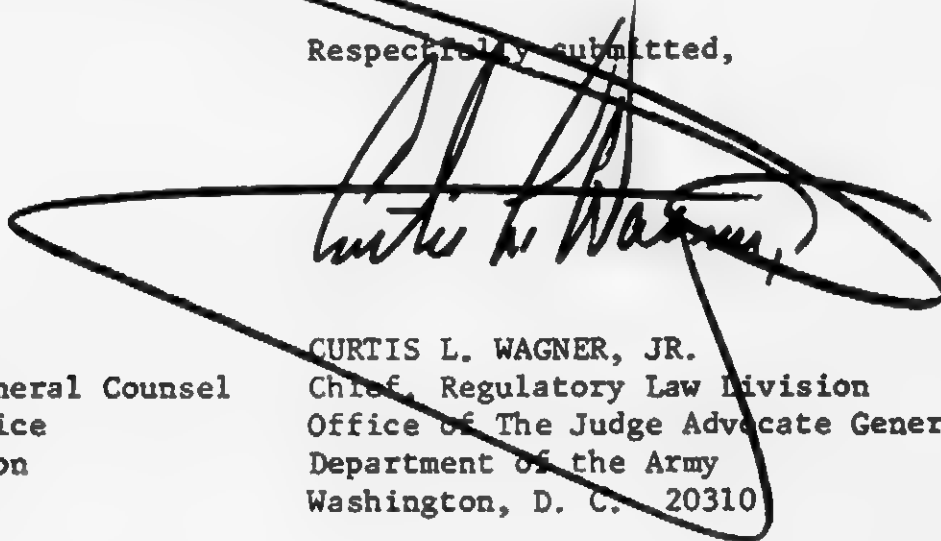
In addition to the tremendous increase in rates, the Department of Defense and the other Executive Agencies may be required to pay huge termination liabilities in the event of cut-backs in service resulting from the increased rates. This clearly is unjust since the services were contracted for and entered into on the basis of rates existing at the time and will be eliminated only because of economic necessity and hardship caused by the carrier. It is noted, in this connection, that no funds are available to the Government for such termination charges. Thus, even further cut-backs might be required to meet this unexpected expense.

It is submitted that the failure to reject the filing at this time or cause AT&T to withdraw the proposed increase in TELPAK rates would be clearly contrary to the public interest, since it would seriously and detrimentally affect the defense effort and the national security.

WHEREFORE, it is respectfully requested that the Commission take immediate action to reject AT&T's proposed increases

in TELPAK rates effective 1 November 1969 for filing at this time or take such action as may be necessary to cause AT&T to withdraw the said increased rates.

Respectfully submitted,



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Of Counsel

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For

THE SECRETARY OF DEFENSE

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of)	
)	
American Telephone and Telegraph Company)	Transmittal No. 10609
)	October 1, 1969
Proposed Revisions to Tariff F. C. C. No. 260,)	
Series 5000 Channels)	

To: The Commission En Banc

AP PETITION FOR REJECTION IN WHOLE OR IN PART
AND FOR OTHER RELIEF

The Associated Press ("AP") respectfully petitions the Commission, pursuant to Sections 4(i), 5(d), 201(b), 203(b), 204 and 205(a) of the Communications Act of 1934 as amended (47 U. S. C. 151 et seq.) and 47 C. F. R. §61.33 and §61.55(e) and (f);

A. To reject, pursuant to 47 C. F. R. §61.69 or 61.117 all tariff material filed with said Transmittal No. 10609, namely 7th Revised Page 81, 14th Revised Page 84, 9th Revised Page 85 and 13th Revised Page 86; or, in the alternative

B. To reject the filing of 7th Revised Page 81; to suspend for the maximum statutory period of three months said 14th Revised Page 84, 9th Revised Page 85 and 13th Revised Page 86; and to order an accounting effective at the conclusion of such suspension period of all amounts received by reason of such increases in charges from each and all customers of such services.

1. AP at the present time is a customer of the issuing carrier with respect to various categories of private line services for news dissemination, including Telpak channels and services, category C. AP was a Telpak customer of AT&T during most of the original Telpak rate period from February, 1961 through August, 1968, and it was a Telpak C customer of AT&T throughout the so-called higher interim rate period, September 1, 1968 to date. AP's continuance as a customer of Telpak C services will depend on whether the said 7th Revised Page 81 is rejected and the increases in charges resulting therefrom avoided. AP is a party of record in the pending FCC proceedings Docket No. 16258 and Docket No. 18128, which encompass Telpak C charges at three different levels, \$25, \$28 and \$30; service terminal charges at three different levels, \$15, \$25 and \$35; and telegraph to telephone equivalency ratios at twelve to one, six to one, and now two to one.

A. Two to One Telegraph to Voice Channel Equivalency

2. The said 7th Revised Page 81 submitted for filing October 1, 1969, is not in compliance with Section 204 of the Communications Act as amended, or the above-cited Tariff regulations of the Commission, and is otherwise unlawful in the particulars hereinafter set forth, and should be rejected forthwith. This action would not preclude AT&T from offering the proposal in evidence with supporting documentation in the forthcoming hearing proceeding Docket No. 18128.

3. The Proposed Revision and Supporting Statements. The

actual text of the disputed tariff revision is as follows:

"Two such channels, or any portion thereof, (C)
or a combination, not exceeding two, of such
channels, between the same pair of service
points, have the equivalent of one voice grade
channel." (C)

The above revision is deceptively innocent in form and fails to reveal the nature and magnitude of the rate increases which would result from its implementation. The only statement with respect to this revision contained in Transmittal No. 10609 is the following:

"The tariff revisions provide for . . . (b) a
change from 6 (3 in the case of 150 baud service)
to 2 in the number of telegraph channels having
the equivalent of one voice grade channel"

Looking further into the attachments to the said Transmittal No. 10609, the only statement with respect to this subject is found on page 6 of a paper entitled "TELPAC RATE ADJUSTMENTS":

"Schedule No. 3 also includes a telegraph to telephone channel equivalency ratio of 2 to 1. The overall relationship between the costs of telephone and telegraph (60-75 speed) type channels (including both terminal and line costs) is slightly under 2 to 1. While considerably more than two telegraph channels can physically be derived from a voice channel, this is offset by the fact that terminal costs for telegraph channels are considerably higher than those for telephone. It is the combined effect of these two phenomena that results in the overall cost relationships referred to above. In

TELPAC, we have reflected this characteristic by keeping the telephone and telegraph service terminal rate levels the same (\$35) and maintaining the overall revenue/cost balance through adjustment of the equivalency to 2 to 1."

As shown below, the above tariff revision is mislabeled by failure to show it as an increase with the symbol "I" and by the absence of justification for an increase in charges as required by the above-cited provisions of the Communications Act, FCC Tariff regulations and the recently adopted Statement on Ratemaking Principles and Factors, 18 F.C.C.2d 761.*

4. The Proposed Revision Would Result in Increases in Charges with Pyramiding Effects. The further limitation in telegraph to voice equivalency to two to one has the direct effect of an increase in charges of varying and substantial amounts, depending on the mix of telegraph grade channels and the fill of each Telpak section, C or D, and the interaction of these factors. The adverse impact from the equivalency change-rate-increase and the widely varying result can be illustrated actually and hypothetically by repricing actual or assumed Telpak services. At the present time, AP has a Telpak C service of 221 miles between New York City and Washington, D. C. The fill on this New York-Washington section is as follows:

* Labeling tariff revisions, which are in fact rate increases, as "rate adjustments" does not excuse noncompliance with statutory standards and tariff regulations, and neither justification for such rate increases nor procedural requirements are satisfied by AT&T's proposal to the FCC that MTT and WATTS rate adjustments (decreases) would depend on when such Telpak rate increases become effective. AT&T letter to FCC October 1, 1969.

- 6 Telephotograph circuits
- 4 FD dataspeed circuits
- 1 Datafax circuit (TP quality)
- 5 FD trunks
- 3 Foreign Exchange telephone lines
- 4 Private telephone tielines
- 1 48KC line (equivalent of 12 VF lines)
- 74 Telegraph lines

The foregoing represents 35 equivalent voice frequency lines plus 74 telegraph channels. For the present equivalency of six for one, AP is using a total of 48 equivalent voice channels out of the maximum 60 permissible. If the telegraph to voice equivalency is reduced to two to one, this would result in the same service being figured as 72 equivalent voice frequency channels or 12 in excess of the Telpak C maximum of 60. Thus, the proposed change in equivalency would mean that AP would have to eliminate 24 of the 72 telegraph circuits or make some other conversion to either interexchange channels or a second Telpak C section. It is also apparent that if there were a larger number of telegraph channels in the mix of channels used in the Telpak C section, a continuation of the same service would require a second Telpak C section, or upgrading to a D section, by reason of the interaction of the change in equivalency with the Telpak tariff structure, at the proposed higher line haul and service terminal rates.

This can be illustrated hypothetically. Assume a Telpak C section of 100 miles is used for telegraph grade channels at a 70 percent fill,

or 504 channels at the 1961-1967 Telpak rates. The line haul monthly charge would be \$2,500 and the service terminal charges would be \$15,120 or a total of \$17,620 for the 504 telegraph channels. At the so-called interim rates of 1968-1969, the monthly charges for the same 504 telegraph grade channels in Telpak C with the reduced six to one equivalency would be \$5,600 for the line haul costs of two Telpak C sections because of the artificial maximum of 360 each and the terminal charges would total \$25,200, for a total of \$30,800. Thus, a measure of increase in the interim rates of September 1, 1968 over the original rates in such a case would be 74 percent, due primarily to the reduction of equivalency. Under the proposed further reduction of equivalency to two to one, monthly charges for the same 504 telegraph channels under the proposed rates would be \$15,000 for the line haul charges for five Telpak C sections, because of the artificial restriction of a maximum of 120 telegraph channels, and \$35,280 for service terminal charges, for a total of \$50,280, or an increase of 185 percent over the original Telpak C rates, and an increase of 63 percent over the so-called interim Telpak rates. Actually, in this situation the conversion probably would be from one Telpak C section to one Telpak D section and one C section. Priced this way, the Telpak D section would cost \$8,500 and the Telpak C section an additional \$3,000, for a total of \$11,500 for the line haul plus \$35,280 for the service terminal charge or a total of \$46,780.

While a one hundred percent utilization of a Telpak C section for telegraph channels may not be typical, the situation assumed does illustrate the significant and variable increases resulting from the equivalency reduction. This is of special concern to the press service by reason of the relatively higher mix of telegraph grade service to other modes of transmission. Under the so-called interim Telpak rates with the more restrictive six to one equivalency, AT&T received revenues from AP for Telpak C services in the amount of approximately \$500,000 per annum. Under the proposed higher Telpak rates and the arbitrary restriction of telegraph channels at two to one, AP will probably discontinue its Telpak C service from New York to Boston, 223 miles, at an early date. Services on the New York to Washington Telpak C section will be reduced substantially or possibly eliminated, depending on the equivalency in effect.

5. Increases in Charges Are Not Justified by Any Marketing, Costing or Revenue Studies or Supporting Data. Except for the mere assertions that "the cost of telephone and telegraph (60-75 speed) type channels (including both terminal and line costs) is slightly under 2 to 1", and that "terminal costs for telegraph channels are considerably higher than those for telephone", no cost or other studies or any other justification is given for this very substantial rate increase resulting from the arbitrary restriction of two telegraph grade channels in one voice carrier spectrum

of approximately 4 kHz. The state of the art permits deriving from 18 to 22 telegraph channels out of the carrier spectrum occupied by a voice grade channel and in the initial Telpak offering, the customer was permitted to have 12 telegraph channels in one voice carrier spectrum. It will be noted also that in all of the three new test rate schedules, which were used as the basis for AT&T's marketing studies, the ratio of two to one was assumed arbitrarily in each case. No attempt was made to study the market effects of any different telegraph to voice equivalency. Further, the assertion that costs for telegraph channels are "considerably higher" than those for telephone is not only without factual support and contrary to experience obtained from present systems, but is rendered suspect by the statement contained in an AT&T paper dated September 29, 1969, entitled "LONG-RUN INCREMENTAL COST ANALYSES OF TELPAK, * * *", in which it is stated:

"It should be noted that any cost breakdown between line haul and terminal is at best an approximation."

This statement means that AT&T has not and does not choose to make any costing breakdown for the two service components (a) line haul and (b) service terminals. Since the proposed two to one equivalency limits arbitrarily and unrealistically the number of telegraph channels which are permitted within one voice carrier spectrum, the proposal would be a

gross waste of a transmission resource, like prohibiting a twenty-passenger vehicle from carrying more than two passengers. Such an uneconomical restriction in the line haul component of a Telpak service should not be permitted and the carrier in this instance has failed to comply with the letter or spirit of the FCC-approved Statement on Rate-making Principles and Factors, 18 F. C. C. 2d 761. The FCC, as protector of the public and consumer interest in such matters, should know the amount and the nature of any proposed increase and its probable impact on consumers or consumer groups before a tariff filing is permitted to go into effect, not afterwards. No such determination can be made from what has been submitted in the instant situation.

B. A 30 Day Notice Period Is Inadequate

6. It is unrealistic and impractical for AP to arrange for the cancellations in service, reconfiguration of networks, budget increases, et cetera, which would follow implementation of the proposed increases, within the time frame of less than 30 days. Actually the prevailing uncertainty as to what rates will or will not be in effect on November 1, 1969 will probably continue until a few days prior to that date, thereby compelling AP to sustain higher charges for a minimum of one month without recourse or opportunity to effect other economies or service changes. Anything less than three months after action by the FCC will result in service dislocations and hardships for which even an accounting order is not an adequate remedy.

WHEREFORE, The Associated Press respectfully requests the Commission to grant the relief requested in this Petition or such other relief as may seem proper.

Respectfully submitted,

THE ASSOCIATED PRESS

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October 9, 1969

**PETITION TO REJECT FURTHER TELPAK
RATE INCREASES OR FOR ALTERNATIVE RELIEF**

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
AMERICAN TELEPHONE AND TELEGRAPH)	Transmittal No. 10609
COMPANY, LONG LINES DEPARTMENT)	October 1, 1969
)	
Revisions of Tariff F.C.C. No. 260, Pages)	
1, 81, 84, 85, 86, Private Line Services)	
Series 5000 (TELPAK))	
)	

To: The Commission

PETITION TO REJECT FURTHER TELPAK
RATE INCREASES OR FOR ALTERNATIVE RELIEF

Comes now, Aerospace Industries Association of America, Inc. ("AIA"), by its attorneys, and, pursuant to the Communications Act of 1934, as amended, particularly sections 4(i), 303(r) and 203(b) thereof (47 U.S.C. 154(i), 303(r), 203(b)), and section 61.33(a) of the Commission's Rules (47 C.F.R. 61.33(a)), makes application for the issuance promptly and in any event before November 1, 1969, of an order either (1) rejecting, as unlawfully filed, proposed revisions of AT&T Tariff F.C.C. No. 260 accompanying Transmittal No. 10609 of October 1, 1969, and purporting to effect further increases in rates and charges for Telpak (Series 5000) services, or (2) staying those increases from becoming effective until such time as the Federal Communications Commission issues a final decision, following a hearing, on the legality of present (interim) and proposed rates and charges for such Telpak services.

The matter is of such significant and imminent impact (the increased Telpak rates are now scheduled to go into effect on November 1, 1969) that application is hereby made for immediate action on this Petition. In addition, if the Commission has any doubts as to its power to grant, or the propriety of granting, the relief here requested, prompt oral argument before the Commission en banc is requested.

Summary

1. AIA is the national trade association of the aerospace manufacturers. Those manufacturers are substantial users of the private line services, including Telpak, provided by AT&T pursuant to Tariff F. C. C. No. 260 and many are heavily dependent upon Telpak. AIA is not a party to the AT&T General Rate Investigation, Docket No. 16258. However, AIA is a party intervenor in the Telpak Sharing Proceeding, Docket No. 17457. Accordingly, AIA is an "interested person" in any proceeding affecting Telpak rates, the rate making principles involved in the determination of Telpak rates, or their overall level and revenue yield.

2. AIA demonstrates hereinafter that in various orders, memoranda and opinions, discussed below, the Commission adopted a procedure to be followed in connection with the institution, consideration and the determination of the legality of rate increases for Telpak; that the procedure was concurred in by AT&T in a stipulation it entered into which resulted in the termination of Phase 1-B of Docket No. 16258

(see F. C. C. 69-892; 18 F. C. C. 2d 761, July 29, 1969); and that the procedure has not been followed by AT&T with respect to the rate increases proposed to be put into effect pursuant to Transmittal No. 10609 in a number of important respects.

3. First, the parties to Phase 1-B of Docket No. 16258 entered into a stipulation, designated "Statement of Rate Making Principles and Factors in Docket No. 16258, Phase 1-B" (hereinafter referred to as "Stipulation") which discussed the principles to be applied in specific rate making issues and recommended procedures to be followed in specific cases. With an exception not here relevant, the Commission stated that it did "approve the procedures . . ." (Id. at p. 764, Para. 9) embodied in the Stipulation. The Stipulation expressly stated (Para. 11) that:

"By such formal or informal procedures as the Commission deems appropriate interested persons will be afforded a timely opportunity to express their views with respect to the formulation of the appropriate methods [to be used in the production of long-run incremental cost and fully distributed cost studies]."

Neither AIA nor the aerospace companies which constitute its membership, and which are clearly "interested persons," has ever been consulted or offered any opportunity to express their views with respect to these matters at any time.

4. Second, on April 10, 1968 (F. C. C. 68-388; 33 Fed. Reg. 5900), the Commission ordered a hearing with respect to substantial increases in Telpak rates initiated by AT&T pursuant to Transmittal No. 10069 of March 25, 1968. However, on July 10, 1968, the Commission adopted a Memorandum Opinion and Order (F. C. C. 68-711; 13 F. C. C. 2d 853), which, while suspending the new rates from becoming effective until September 1, 1968, and ordering the increased rates to be made subject to an accounting, deferred the hearing ". . . until further order of the Commission" It took this action because it expressed the view that there were certain issues being considered in Phase 1-B which are of "threshold essentiality to a determination of the reasonableness of the specific rates and rate relationships within the individual rate structures . . ." and because ". . . the resolution of the issues in Docket No. 17457 regarding TELPAK sharing may have an effect upon the market for TELPAK services on the basis of which Respondents calculated their costs of furnishing such services" (Id. Paras 8, 9). Apparently when the Commission issued its subsequent Memorandum Opinion and Order of July 29, 1969, directing that the record of Phase 1-B be incorporated by reference into Docket No. 18128 (18 F. C. C. 2d 761, 765), it determined that the issues involved in Phase 1-B, which it had hereto considered to be of "threshold essentiality," could be considered in Docket No. 18128. However, the Commission has expressed no such

similar judgment with respect to the sharing issues involved in Docket No. 17457 and a final decision has not yet been issued in that proceeding. Moreover, on April 25, 1969, the Chief of the Common Carrier Bureau issued a Recommended Decision which concluded that the existing Telpak sharing regulations are unreasonably discriminatory and recommended that the discrimination be eliminated either by permitting the sharing of all private line services or by eliminating Telpak sharing entirely. Effectuation of either recommendation would, of course, radically alter the revenues which AT&T would collect. Nevertheless, it is perfectly obvious that the so-called "studies" accompanying Transmittal No. 10609 are made on the assumption that there will be no changes in the sharing regulations. That assumption is wholly inappropriate in the circumstances and makes it impossible for the Commission to make any judgment whatsoever on the basis of the material transmitted by AT&T.

5. Third, in proposing the current Telpak rate increases, AT&T has in part ignored and in remaining part misapplied the critical factor of relative demand elasticity. No study of any nature was made concerning the availability of private microwave to serve the needs of aerospace manufacturers or of their ability or willingness to convert to private microwave if Telpak rates are raised as proposed. Instead, aerospace manufacturers were merely lumped in the category, "other" users, without any attempt to discriminate between AIA members and such other users in terms of the extent of the respective size, use and ability of dissimilar users to meet their communications needs by private microwave.

6. Fourth, the so-called "implementing studies" proffered by AT&T suffer from basic and critical defects in the techniques and methodology employed. Further, these studies explicitly concede that the return to AT&T under existing tariffs is compensatory. In these circumstances, and particularly in view of the fact that no hearing has yet been held on the prior rate increase (which brought the existing rate into effect), the new and further increases should not be permitted to become effective.

7. An additional consideration which compels either rejection of the new Telpak rate increases or staying their effectiveness is that unless the Commission takes such action it will have denied Telpak users the hearing to which they are entitled with respect to previous rate increases now in effect. When the Commission deferred the hearing on the Telpak rate increases proposed by AT&T pursuant to Transmittal No. 10069 of March 25, 1968, it did so in the face of the mandate of section 204 of the Communications Act (47 U.S.C. 204) which provides that if the Commission orders a hearing with respect to increases or proposed increases in charges, it shall give the hearing "preference over all other questions pending before it and decide the same as speedily as possible." Assuming that the Commission possesses the authority to defer such a hearing, that authority can only be found in section 4(i) and 303(r) (47 U.S.C. 154(i), 303(r)). But the three sections must be read as an

harmonious whole; and, so read, they do not permit the Commission to follow a course of action which exposes the consumers to successive and cumulative increases in rates and charges without having afforded them a timely hearing as to the legality of those rates. In consequence, the Commission is required in these circumstances to exercise its authority under sections 4(i) and 303(r), to reject this second round of increases or at least to prevent those increases from becoming effective until a hearing is held with respect to the legality of present and proposed rates. Such action is particularly appropriate in a case, such as this, in which neither a three-month suspension nor an accounting order provide realistic protection to the consumers and where the carriers supporting data indicates that the existing rates are compensatory and impose no burden on customers for other carrier-provided services.

Interest of AIA

8. AIA is organized as a non-stock, membership corporation under the laws of the State of New York and is authorized, as a non-profit corporation, to conduct its affairs in the District of Columbia. AIA is the national trade association of the manufacturers of aircraft, missiles, spacecraft, propulsion, navigation and guidance systems, support equipment, accessories, parts, materials and components used in the construction, operation and maintenance of these aerospace products. Current membership of AIA includes 58 aerospace manufacturing companies plus their corporate divisions.

9. The aerospace industry consists of AIA member companies, aerospace companies that are not AIA members and the aerospace activities of non-member companies. In 1967 monthly average employment in the aerospace industry was 1,392,000 persons and its sales were over \$27.2 billion, of which approximately 75 percent were to various federal government agencies. As a consequence, the aerospace industry is the largest seller to the federal government. Since approximately 50 percent of the contract dollars on its government contracts are subcontracted, the aerospace industry is also the largest buyer for government account. AIA member companies constitute the core of the aerospace industry. In 1968 they employed more than 1,100,000 persons and had sales of over \$23 billion. They received over 80 percent of the procurement dollars spent each year by the Department of Defense and the National Aeronautics and Space Administration for aerospace goods and services.

10. There is a vitally close relationship between the aerospace industry and the defense of the United States, and there is a close technical interdependence among the aerospace manufacturers, their subcontractors and the government agencies, military services and air carriers with which they deal -- all of which must operate under closely coordinated time schedules. Yet the manufacturers and their subcontractors and customers, including various components of government agencies and of the military services, are widely dispersed within the United States. Typically, the administrative offices of a company

may be in one section of the United States, the production plants working on a government contract in one or more other sections, testing facilities in still another section and subcontractors widely dispersed throughout the nation.

11. Because it is no longer financially or physically possible for an aerospace manufacturer to develop and produce the large jet aircraft of today and the jumbo jet which will enter service this fall, a large part of the aircraft is subcontracted (67% of the Boeing 747 airframe weight) to widely dispersed companies which, in many instances, assume a part of the financing burden. In the case of the 710,000 pound 747, Boeing lined up its subcontracting team, set a target date for completion of its first aircraft three years later, moved a mountain, built the world's largest plant (by volume), employed or transferred 21,000 workers to its assembly plant, and rolled out its first aircraft one day ahead of schedule.

12. The role of communications in this exceptional accomplishment is described eloquently in an AT&T advertisement which features a picture of the 747 with the caption "You're looking at 4-1/2 million airplane parts connected by telephone". Moreover, new technical developments require increasingly close and expeditious working relationships between the aerospace manufacturers and the airlines following delivery of the aircraft. For example, the manufacturer of a new jet transport aircraft has agreed to provide product support to its customers to the extent that it has been

necessary for the manufacturer to establish a world-wide communications network having the capabilities of voice, teletypewriter, data and facsimile transmission. Included as a part of the network will be the customer airlines' maintenance bases and strategic facilities.

13. Data processing -- often by means of computers situated far from the source of accumulation of the data -- is essential for purposes of production, inventory, payroll and other controls. Engineers, production and testing personnel must be in constant voice communication. Design and engineering plans must be readily transmittable by means of facsimile. Therefore, the aerospace industry and the security of the United States are specially dependent upon and in need of rapid, efficient and economical means of transmission of information between designated points, including voice, teletypewriter, facsimile, data for computer processes, signalling, metering, etc.

14. Telpak services currently offered by AT&T provide such large capacity communications facilities between designated points. In consequence, member companies of AIA are large users of Telpak. In fact, eight aerospace companies alone pay approximately over \$14,295,000 per year for interstate Telpak services, including terminal costs; and it is estimated that the rate increases which would be effectuated by Transmittal No. 10609 would increase such costs for those companies by approximately \$3,750,000, or over 26%.

The Proceedings Involved

15. Telpak service was first instituted by AT&T in January of 1961 as a competitive response to private microwave. Although the service has been available for well over eight years, the reasonableness of the rates charged for Telpaks C and D has never been determined.^{1/} The original Telpak case determined that there is apparent competitive justification for Telpaks C and D; however, the Commission was unable to determine whether then existing rates charged for those services were compensatory. 37 F.C.C. 111 (1964). Subsequently, the Commission instituted the AT&T General Rate Investigation (Docket No. 16258) to determine, among other things, whether the charges made by AT&T for its various classes of services make an appropriate contribution to AT&T's interstate revenue requirements. 2 F.C.C. 2d 142 (1965); 2 F.C.C. 2d 871 (1965). Thereafter, in 1966, the Commission terminated the original Telpak case and incorporated the undetermined issue, relating to the compensatory nature of Telpaks C and D into Phase 1-B of Docket No. 16258. 7 F.C.C. 2d 30. However,

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Telpaks A and B were also made available in 1961. They were dropped by AT&T on January 9, 1967 (Transmittal No. 9467), following the Commission's Memorandum Opinion and Order in the original Telpak case, 7 F.C.C. 2d 30 (1966).

Phase 1-B was never completed; instead, it has in effect been terminated by the stipulation entered into among the parties and the incorporation of the record in Docket 18128. 18 F.C.C. 2d 761; F.C.C. 69-842 (July 29, 1969).

13. The Stipulation was described by the Commission as dealing

" . . . with both substance and procedure. In effect, the statement sets forth a set of principles and accompanying procedures which would be applied and tested in conjunction with the consideration of specific rate-making issues, such as those now involved in the pending docket 18128, which embraces all private line services, including Telpak service."

The Commission noted the Stipulation and approved the procedures^{2/} (Id., para. 9). However, with respect to substance, the Stipulation merely recognized "the relevance of both fully distributed and incremental costs in considering appropriate rate levels of specific classes of service", but it did not purport to determine the weight to be accorded to either or both of these factors. Nor did the Commission make any determination in this respect (Ibid.). It merely noted that methodologies would be developed to explore both factors and that Bell would file by

^{2/}

With the express exception of a recommendation (not joined in by the staff of the Common Carrier Bureau) to reopen the record in the Telpak Sharing case, Docket No. 17457, and to consolidate that case with Docket No. 18128. Id., para. 13.

October 1, 1969, ". . . implementing studies called for by the State-
ment and any related rate adjustments based thereon . . ." (Ibid.) .

Paragraph 11 of the Stipulation stated:

"By such formal or informal procedure as the
Commission deems appropriate, interested
persons will be afforded a timely opportunity
to express their views with respect to the
formulation of appropriate methods." (Emphasis
supplied.)

In that connection the Commission stated:

"Implementation of the stipulation and the de-
velopment of such needed data . . . will permit
us to proceed to the testing of specific rate-
making principles in the light of the issues in
the Telpak-Private Line case (docket 18128)
. . . we believe that the procedures will enable
us to reach these rate issues with greater dispatch
and effectiveness than if further extended hearings
were held in docket 16258."

16. In addition to Docket No. 16258, two other related
proceedings were initiated by the Commission during the period since
Telpak was first instituted in 1961. One proceeding in Docket No. 18128,
was directed, among other things, to the very substantial increases in
Telpak rates initiated by AT&T pursuant to Transmittal No. 10069 of
March 25, 1968. At the time Telpak service was first instituted by
AT&T in January of 1961, the monthly line haulage rate for Telpak C
was \$25 per airline mile; for Telpak D it was \$45 per airline mile. The
monthly charges for service terminals were \$15 for the first at a location
and \$5 for additional ones. The ratio of the equivalent telegraph channels
per voice telephone channel (up to 150 baud) was 12 to 1. Transmittal

No. 10069 increased these rates as follows: \$28 per airline mile for Telpak C and \$60 per airline mile for Telpak D; the monthly charges for service terminals were raised to \$25 and \$10 respectively and the telegraph-telephone channel (up to 150 baud) equivalence ratio was fixed at 6 to 1. Accordingly, on April 10, 1968 (F. C. C. 68-388; 33 Fed. Reg. 5900), the Commission instituted a hearing into the lawfulness of these increases and suspended their effectiveness until September 1, 1968.

17. However, that hearing has never been held. Instead, in a Memorandum Opinion and Order adopted July 10, 1968 (F. C. C. 68-711; 13 F. C. C. 2d 853), the Commission directed that the hearing be deferred "...until further order of the Commission...". The reason for this action was explained by the Commission as follows:

"8. Thus, with respect to Respondents' rate for TELPAK service, including those now under suspension and investigation in Docket No. 18128, we will determine in Phase 1-B of Docket No. 16258 whether competitive or other valid considerations justify the pricing discrimination existing in the TELPAK offering; and, if so, whether Respondents' existing or proposed rates for TELPAK will make an appropriate contribution to Respondents' total interstate revenue requirements. These determinations with respect to the revenue objectives appropriate to TELPAK and other services are, in our opinion, of threshold essentiality to a determination of the reasonableness and lawfulness of the specific rates and rate relationships within the individual rate structures. It is also our opinion that we can arrive at these threshold determinations without simultaneously resolving all other questions.

"9. We recognize that the resolution of the issue in Docket No. 17457 regarding TELPAK sharing may have an effect upon the market for TELPAK services on the basis of which Respondents have calculated their costs of furnishing such services, which costs have been presented by Respondents in Docket No. 16258 in purported justification of their proposed revised TELPAK rates. This, in turn, could have a substantial impact on the over-all level and revenue yield of TELPAK rates as well as the propriety of the internal rate components of the TELPAK schedule. As we noted in our Order in Docket No. 17457 (FCC 63-389) concerning TELPAK sharing, we expect the presiding officer to employ all reasonable means to expedite that proceeding, and also expect the Chief, Common Carrier Bureau to issue a recommended decision at the earliest possible date. Thus, the proceedings in Docket No. 17457 and those in Docket No. 16258 will be going forward in parallel. We will, therefore, defer hearings in Docket No. 18128 concerning the internal specifics of the TELPAK rate structure until the rate principles determinations are made in Docket No. 16258 and the sharing issue is decided in Docket No. 17457." (Footnote omitted).

18. Docket No. 17457, referred to above, was initiated by the Memorandum Opinion and Order adopted by the Commission on May 19, 1967 (8 F.C.C. 2d 178; F.C.C. 67-612), instituting an investigation into the lawfulness of provisions of AT&T's Private Line Tariff 260 which limit the sharing of Telpak C and D, in effect, to government agencies, and regulated carriers and public utilities. After 26 days of hearing the record in that proceeding was certified to the Commission by order of the Examiner issued on October 8, 1968 (F.C.C. 68 M-1391), and on April 25, 1969, the Chief of the Common Carrier Bureau issued his Recommended Decision. That Decision concluded that the sharing

regulations ". . . result in a rate discount to certain Private Line users and deny such discount to other users without adequate or sufficient justification . . ." and recommended issuance of a final order requiring the carriers to file tariff revisions eliminating the unlawful discriminations and preferences. The Recommended Decision (Paras. 52-63) expressed the view that two general approaches appear to be open to AT&T. One would be to discontinue any Telpak sharing and the other would be to permit all Private Line users to share. The Commission has not yet issued its final decision in Docket No. 17457.

19. In brief, over a year ago AT&T raised its Telpak rates and certain substantial users, including AIA, contested the legality of that rate increase and the users of Telpak have never been accorded a hearing with respect to the legality of the increased rates, or, indeed, of any rate which has been charged for the service. Rather they have been relegated to a hearing (Docket No. 18128) which has been in a state of suspension for a year. Presumably that hearing will remain in suspension until the final determination of the Telpak Sharing Proceeding (Docket No. 17457). Yet AT&T is attempting in Transmittal No. 10609 of October 1, 1969, to institute a second substantial rate increase.

Argument

I. In the Circumstances of This Case Failure to
Reject the Tariff or Stay the Telpak Rate Increases
As Requested Would Be Arbitrary and Capricious.

20. In 1968, AT&T instituted substantial Telpak rate increases. The Commission ordered a hearing into the lawfulness of those increases, suspended their effectiveness until September 1, 1968, and made the increase which went into effect thereafter subject to an accounting order. However, for the reasons set forth above, it expressly deferred holding that hearing "until further order of the Commission" (supra, para. 17). If the Commission had chosen a different course and conducted the expedited hearing required by section 204 there is little question that in the circumstances it would not have permitted AT&T to effectuate still another set of Telpak rate increases before that proceeding was completed -- particularly where, as here (see para. 25, infra), AT&T has in effect admitted that the present rates are compensatory. Rather, in those circumstances the Commission would, it must be assumed, exercise the broad power to issue general and specific orders contained in sections 4(i) and 303(r) of the Communications Act (47 U.S.C. 154(i), 303(r)) and its authority under section 203(b) of the Act (47 U.S.C. 203(b)) to modify the thirty-day notice provisions ordinarily applicable to rate changes to prevent the second set of rate increases from becoming effective at least until the legality of the first set was finally determined.

21. That the Commission has the authority under sections 4(i) and 303(r) to issue such an order is now established by cases dealing with the scope of its own authority and cases concerning the parallel power of other regulatory agencies operating under similar statutes. Thus, in United States v. Southwestern Cable Co., 392 U.S. 157 (1968), sections 4(i) and 303(r) were held to authorize the Commission to issue a prohibitory order which temporarily limited the expansion of certain CATV systems without a hearing. The Supreme Court so held, notwithstanding the fact that section 312(c) of the Act, the only relevant provision dealing with cease and desist orders expressly requires a prior hearing. See also General Telephone Co. of California v. F.C.C., 413 F.2d 390, 16 R.R. 2d 2001, 2018 (App.D.C. 1969). Similar authority has been found in the Federal Power Commission which operates under a statute substantially similar to the Communications Act. In Amerada Petroleum Corp. v. Federal Power Commission, 293 F.2d 372 (C.A. 10, 1961), section 16 of the Natural Gas Act (15 U.S.C. 717o), a provision almost identical with section 4(i) of the Communications Act, was held to authorize the Federal Power Commission to bar rate changes to be made effective during the period when prior changes relating to the same service were suspended. See also Federal Power Commission v. Hunt, 376 U.S. 515 (1964); In re Permian Basin Area Rate Cases, 390 U.S. 747 (1968); Federal Power Commission v. Texaco, 377 U.S. 33, 42-44 (1964). (For authority under the Interstate Commerce

Act, see American Commerce Lines, Inc. v. Louisville & Nashville R. Co., 392 U.S. 571 (1968).) In addition, section 203(b) of the Communications Act appears to confer almost express authority upon the Commission to delay a proposed rate change from becoming effective for a period exceeding thirty days. That section provides that no change in charges, etc., shall become effective ". . . except after thirty days' notice to the Commission and to the public . . . but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under the authority of this section in particular instances . . .". The authority so to "modify" has been held adequate to empower the Commission to shorten the thirty day period. United States v. American Tel. & Tel. Co., 57 F.Supp. 451, 455 (S.D.N.Y.), affirmed sub nom Hotel Astor v. United States, 325 U.S. 837 (1945). Certainly if the neutral word, "modify", authorizes the Commission to shorten the thirty-day period in appropriate circumstances, it should also be read to authorize the Commission to extend the period when such action is required.

22. The background of this proceeding makes it clear that it would be wholly arbitrary and capricious for the Commission not to exercise its powers under section 4(i), 303(r) and 203(b) to prevent the new set of rate increases from becoming effective until the legality of the earlier ones are finally determined. As indicated above, that background includes deferral of the hearing ordered with respect to the earlier rates "until further order of the Commission" (para. 17, supra). The Commission

took this action because it considered it appropriate procedure to

" . . . defer hearings in Docket No. 18128 concerning the internal specifics of the TELPAK rate structure until the rate principles determinations are made in Docket No. 16258 and the sharing issue is decided in Docket No. 17457."

In the same Memorandum Opinion and Order the Commission stated it expected the Examiner to expedite the hearing in Docket No. 17457 and " . . . the Chief, Common Carrier Bureau to issue a recommended decision at the earliest possible date." Subsequently, in a "Petition for Interim Relief" filed on August 6, 1968, AIA contended that, however justified the decision to defer the hearing in Docket No. 18128, the action was wholly inconsistent with the direction contained in section 204 to accord to such a hearing and decision of the questions involved " . . . preference over all other questions pending before it [the Commission] and decide the same as speedily as possible." AIA argued that in the circumstances the Commission was obligated to exercise its power under section 4(i) and 303(r) to prevent the rate increase from becoming effective until after the postponed hearing was ultimately held. In an order issued on August 28, 1968 (14 F.C.C. 2d 564; F.C.C. 68-872), the Commission rejected the contentions concerning its powers under section 4(i) and 303(r) made by AIA. In addition, it took the position that the procedure it was following would not constitute a deferral of hearings on the 1968 Telpak rate increases and therefore in contravention of the directions to expedite and prefer contained in section 204, the Commission said:

"13. Aerospace Industries appears to be under the misapprehension that our deferral of proceedings in this docket amounts to a deferral of hearing on the proposed increases in TELPAK rates. As we have stated on numerous occasions, the overall level of TELPAK rates, including the increased rates effective September 1, 1968, is directly at issue in Docket No. 16258 and may be affected by our action in Docket No. 17457, both of which we have ordered expedited. At issue in Docket No. 18128 are the internal rate structure components of which we do not understand Aerospace Industries to complain. "3/

23. We do not find it necessary to reargue the merits of the Commission's view that, because it had ordered both the proceedings in Docket No. 16258 and in Docket No. 17457 to be expedited, the section 204 directions to expedite and prefer had been conformed with in respect to the "hearings on the proposed increases in TELPAK rates" which were put into effect in September of 1968. In any event, that contention is no longer available to the Commission. Clearly Docket No. 16258 has not been "expedited" in the sense that the Commission used the term. Rather, without reaching any decision concerning the overall level of Telpak rates, including those increased effective September 1, 1968, the record in Phase 1-B has now merely been incorporated in Docket No. 18128 and an adjudication with respect to the 1968 Telpak rate increases has not yet occurred. In these circumstances the Commission obviously can no

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If the Commission's reference to "internal rate structure components" was meant to refer to actual rates, the Commission's understanding was plainly wrong because that is precisely what AIA was complaining about.

longer continue to maintain that the manner in which Docket No. 16258 has been handled has contributed to providing aerospace companies and other consumers with the required preferred and expedited hearing concerning the 1968 rate increases.^{4/} Rather, the customers affected by the 1968 rate increases are no nearer a determination of the legality of those increases and their situation is now worsened by an additional rate increase.

24. The fact that the Commission had ordered the Telpak sharing proceeding (Docket No. 17457) to be expedited constituted the other prong of the Commission's contention that it had not violated section 204 by deferring a hearing with respect to the 1968 rate increases. It had already determined in its Memorandum Opinion and Order of July 10, 1968 (para. 17, supra), that the final decision in the

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Examination of the Stipulation and the Commission's Memorandum Opinion and Order of July 29, 1969 makes it apparent that both the parties and the Commission had wearied of the lengthy economic symposium into which the proceedings in Docket No. 16258 had developed and had come to the view that the principles considered during the course of that symposium could best be ". . . tested in conjunction with the consideration of specific ratemaking issues, such as those now involved in the pending docket 18128, which embraces all Private Line service, including Telpak service." 18 F.C.C. 2d, supra, 761, at para. 4. Obviously, such "specific ratemaking issues" could have been considered in Docket No. 16258 if in that proceeding AT&T had suggested specific rates for Telpak similar to those now proposed as actual tariff amendments. The significant difference would have been that there would not be an immediate impact upon customers, including customers such as aerospace manufacturers, not parties to Docket No. 16258. Those customers should not actually be burdened by the new rates merely because the Commission chose to consider specific Private Line ratemaking issues in Docket No. 18128 instead of in Docket No. 16258.

Telpak sharing proceeding "could have a substantial impact on" the propriety of the internal rate components of Telpak, on their over-all level and on their revenue yield. However, the Commission's view that the "expedited" proceedings in Docket No. 17457 somehow operated to provide the expedited rate hearing required by section 204 is no longer available. The plain fact of the matter is that the Commission simply has not expedited the proceeding. The record in that proceeding was certified to the Commission on October 6, 1968, more than one year ago (F.C.C. 68M-1391). Nevertheless, the Recommended Decision of the Chief of the Common Carrier Bureau in this "expedited" proceeding was not issued until April 25, 1969, more than six months later. Now, nearly an additional six months have passed and the Commission has neither finally decided the case nor even indicated if oral argument will be held or when. In these circumstances the Commission is no longer in a position to contend that it is expediting completion of Docket No. 17457. In addition, the whole pattern of the procedure adopted by the Commission with respect to the various Telpak proceedings was to assign an order of priority to their decisions: first, Dockets Nos. 16258 and 17457, and then Docket No. 18128. However, it has modified that order of procedure with respect to the relationship between Docket No. 16258 and Docket No. 18128 and Docket No. 17457 has not been completed. In other words, the situation and factors upon which the Commission depended in establishing the temporal order on which the various proceedings would be heard have altered radically

since 1968. In light of all of the foregoing it is clear that the Commission has ample authority to take appropriate remedial action; and in the present circumstances it is clearly incumbent upon the Commission to exercise such authority to grant the relief requested herein in order to prevent injury to the Telpak customers.

II. A Further Increase in Telpak Rates
Is not Justified Since Present Rates
Are Conceded to be Compensatory.

25. Grant of the relief requested is required because the rate increases now proposed are not justified in view of AT&T's virtual admission that the present Telpak rates are compensatory. In the Stipulation it was agreed (Item 12) that "the rates for any category of service should produce a rate level which is not below LRIC . . .". (Emphasis added.) In other words, it was agreed among the parties that, generally, LRIC should constitute the "rate floor," i.e., the point at which the rates are at least compensatory. Attachment C to AT&T's submission of September 29, 1969, entitled "A Long-Run Incremental Cost Analysis of TELPAK Private Telephone and Private Telegraph Service" provides a summary statement of incremental cost factors applied to the total estimated end of 1971 market quantities. Based on the data submitted in support of Attachment C, the following breakout has been prepared of the LRIC costs, estimated revenues and profit or loss for the constituent rate elements, i.e., Telpak C line haul charges, Telpak D line haul charges and terminal charges.

Incremental Unit Costs and Total Estimated End-of-1971 Market Quantities
(Thousands of Dollars)

	<u>Line Haul</u>		Terminals	Total
	TELPAK C	TELPAK D		
<u>Originally filed rates</u>				
LRIC Costs	\$ 36,200	\$102,000	\$170,500	\$308,700
Estimated Revenues	89,000	90,800	53,900	233,700
Profit [loss]	52,800	[11,200]	[116,600]	[75,000]
<u>Interim rates that became effective September 1, 1968</u>				
LRIC Costs	42,300	93,000	164,200	299,500
Estimated Revenues	109,500	103,400	87,900	300,800
Profit [loss]	67,200	10,400	[76,300]	1,300
<u>Rates filed to be effective November 1, 1969</u>				
LRIC Costs	39,800	79,900	143,700	263,400
Estimated Revenues	112,500	129,500	106,600	348,600
Profit [loss]	72,700	49,600	[37,100]	85,200

Sources:

- (1) AT&T: Attachment C to "Long-Run Incremental Analysis of TELPAK Private Line Telephone and Private Line Telegraph Services".
- (2) AT&T: "Appendix to Interstate Private Line Market Study" Tab 15, worksheets 9, 33, 45, adjusted to force reconciliation with Attachment C (Source 1 above).

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26. The foregoing table reveals that the interim (present) rates are compensatory with a contribution of \$1.3 million to AT&T total revenues. The proposed rates, on the other hand, would generate a profit or contribution of \$85 million. This contribution does not necessarily constitute a bookkeeping profit because it conceivably represents the additional revenue made available to Telpak to offset the costs of other services which constitute the bulk of the Bell System. Thus, it enables the other services to be offered at lower rates than would be possible if Telpak were not in existence. The present posture of the applicable rates is therefore as follows: interim rates became effective September 1, 1968; such rates presently produce a "profit" for the telephone company and are, therefore, certainly compensatory; and the proposed rates filed to be effective November 1, 1969, will show a "profit" in the order of approximately \$85 million. The question presented is whether the Commission should permit the latter rates to

5/ It will be noted that the above Table sets forth data for "incremental unit costs applied to total estimated market quantities" rather than long-run incremental costs. It should be recognized that a total long-run incremental cost applicable to Telpak, if properly developed, would be derived by comparing the costs incurred by the Bell System under the respective rate schedules with the costs which would be incurred by the Bell System with no Telpak offering whatever. The difference between these two cost developments would represent true long-run incremental costs. The importance of this distinction is that in the absence of Telpak some shifts would occur in Telpak customers to other offerings within the Bell System, such as private line, WATS, etc. Such shifts would represent Telpak costs which would not be saved by the Bell System absent the Telpak offering.

become effective during the period in which it is still considering the validity of existing rates; or rather whether it should permit existing rates which are admittedly compensatory to remain in effect during the period when it is determining the appropriate rate level. In view of the fact that customers have never been afforded a hearing on the appropriate rate; and in view of the substantial questions raised with respect to the procedure and methodology followed by the telephone company, and particularly its failure to comply with the "Agreement" pursuant to which the proceeding in Docket 16258 was terminated, it is submitted that the Commission should not permit the new proposed rates to become effective.

III. The AT&T Cost Study Does Not Comply With
The Stipulation in Docket 16258 or With Section
61.33 of The Commission's Rules And, In Any
Event, Does Not Support a Rate Increase.

27. In addition to the legal and equitable considerations described above, the new Telpak rates should be rejected or their effectiveness stayed pending a decision as to the legality of the existing and proposed rates because AT&T simply has failed to follow the procedures contained in the Stipulation pursuant to which the record in Docket No. 16258 was incorporated in Docket No. 18128 in a number of significant respects. Thus, the Stipulation expressly states (para. 11) that ". . . interested persons will be afforded a timely opportunity to

express their views with respect to the formulation of the appropriate methods . . . " to be used in the production of long-run incremental costs and fully distributed cost studies. That the phrase "interested persons" meant something more than parties to the Stipulation or to Docket No. 16258 is perfectly clear from the fact that the Stipulation elsewhere refers to "the parties", the "several parties" and the "participating parties". Accordingly, the reference to "interested persons" must obviously be to those affected who were not parties to Docket No. 16258. Prior to the adoption of the Stipulation, AIA had clearly evidenced its "interest" in Telpak rates by its intervention in Docket No. 17457 and Docket No. 18128. Indeed, once it is conceded, as it must be, that the phrase "interested persons" refers to parties other than those in Docket No. 16258, it is difficult to conceive to whom the phrase "interested persons" would refer if it did not refer to AIA. Yet AIA was never offered an opportunity, "timely" or otherwise, to express its views with respect to the cost questions. Indeed, if it had been it is hardly likely, in the light of the serious consideration which AIA member companies have been and are currently giving to service alternatives other than AT&T's Telpak, that the aerospace industry would have been lumped in the category of "others". At a minimum this category would have been refined to discriminate on the basis of use, size, capital, communications know-how, and other

relevant criteria with the necessary result that appropriate and meaningful weight would have been given to the criterion of demand elasticity.

28. In addition, AT&T's cost studies clearly assume that the existing sharing regulations will remain in effect. That assumption is in flat contradiction to reality. Indeed, it was because of serious doubts as to the validity of the assumption that the Commission deferred the hearings in Docket No. 18128 until the completion of Docket No. 17457. Moreover, the April 23 Recommended Decision of the Chief of the Common Carrier Bureau in that Docket concluded that the sharing regulations are not reasonable. It recommended either that the sharing privilege be eliminated entirely or that it be extended to all Private Line users. Either course would have a most obvious and serious impact upon the level and revenue yield of Telpak rates and upon its internal rate components. It is true that AT&T disagrees with the recommendations of the Chief of the Common Carrier Bureau. Nevertheless, in the circumstances, at a minimum, AT&T was required to consider the impact not only of the existing regulations but of the alternatives suggested by the Chief of the Common Carrier Bureau. AT&T's failure to do so makes it clear that it did not take seriously its obligation to make further cost studies and that the "studies" made simply do not meet the conditions of the Stipulation. Further, in these circumstances

AT&T's "studies" cannot be deemed to meet the requirement contained in Section 61.33 of the Commission's Rules (47 CFR 61.33(a)) that changes in charges be accompanied by a detailed statement of the reasons therefor. The currently proposed tariff revisions must therefore be rejected.

29. An examination of the so-called studies discloses that they are so replete with fundamental errors as to make it clear that they were not seriously undertaken in the first place and do not meet AT&T's obligations under the Stipulation. The table set forth at page 25, supra, also reveals the disproportionality of the revenues and costs of the respective rate elements. Under all three of the rate schedules, AT&T's figures disclose that Telpak C charges substantially exceed its associated LRIC costs. Indeed, under AT&T's proposal, Telpak C revenues are three times Telpak C costs. This is so even though Telpak C now earns a profit in excess of the total estimated cost for the line haul service involved. On the other hand, terminal charges now account for little over half of the costs associated with terminals. However, even under the proposed new rate schedule, terminal revenues would cover only three-quarters of the terminal costs. On the other hand, under the proposal the Telpak D line haul

charges will yield a profit in excess of sixty percent over and above the assured eight and one-half percent return on associated net investment.

30. AT&T's attempted justification of the newly proposed ratio of telegraph to telephone channel equivalencies is wholly unrelated to cost differences. AT&T argues that total costs, including terminals approximate a 2:1 ratio of telegraph to telephone, and it states that the difference results almost entirely from terminal costs. However, it does not take the simple course of adjusting the terminal costs. Instead, it increases the line haul charges, even though, as a technical matter, an equivalency ratio of 18 to 1 is possible. In consequence, the long-haul user is penalized because he must absorb much of the high cost of terminals even though short-haul users in fact use proportionately more terminals.

31. It is axiomatic in the application of rudimentary principles of incremental costing that any acceleration in the rate of growth will result in lower unit costs. It is also fundamental that a slower growth rate results in higher unit costs as the effects of scale economies are retarded. Since the varying rate schedules can affect the rate of growth of the Bell System, each rate schedule

should be analyzed in terms of the separate cost functions which it creates. All other factors remaining constant, rate schedules which stimulate rapid expansion of the system necessarily result in lower unit costs than those which discourage or retard system expansion. However, the cost study which is offered in support of AT&T's rate proposals fails to make any meaningful application of the principle of incremental costing since the proposed rates apply a single unit cost to all levels of rate increase.

32. The proposed rates suffer from the additional failure to recognize and make allowance for the comparatively high density which characterizes Telpak communications as compared with other AT&T services, such as ordinary private line and MTT, but unlike the other services, Telpak is essentially a volume service. Telpak C has a base capacity of 60 channels, and Telpak D a base capacity of 240 channels. Accordingly, by their very nature Telpak C and Telpak D generate high density usage. Moreover, Telpak is ordinarily required in connection with large concentrations of population and substantial economic activity. It would therefore be appropriate to deduce that Telpak is superimposed upon the heavy volume routes of AT&T's other services. It follows that Telpak involves a

much greater proportion of high density, low-cost facilities than does the average MTT telephone circuit.

33. Further, although the high-density characteristics of Telpak are of record and undisputed in Docket 16258, the AT&T cost studies do not reflect these admitted facts and the studies relied upon are devoid of any bases to support proposed Telpak costs on the unsupported premise that it bears the same density characteristics as the remainder of the Bell System.

34. Another example is provided by the Full Additional Cost Studies which were conducted by AT&T in 1967. In those studies the adjustment to net investment levels from gross investment was derived simply from the ratio of accumulated book depreciation estimated for a particular property account to the total book investment in the same account. The use of such book depreciation accruals is inaccurate since it produces some inflation of accrued depreciation when applied to incremental investment. This result follows since the property accounts include substantial amounts of obsolete equipment. The high unit investment costs of that equipment had been depreciating for many more years than the more recent, low-cost

facilities which were being costed as incremental investment. Although this approach, which uses the simple ratio described above, obviously requires a reduction in the amounts allowed for accrued depreciation, the reduction has not been made.

35. Finally, although as indicated above, AT&T overstated its depreciation in 1967, it has now made a fundamental error which results in significant understatement of accrued depreciation. What it has done is to use only the depreciation which would accrue during a five-year planning period. AT&T has failed to consider depreciation as an expression of the long-term average depreciation accrual of the incremental property involved. This approach fails to accord appropriate significance to the function of return on investment as applied to individual units of property. Instead, it treats return on investment like a cash expenditure equal to some fixed percentage of net investment. In fact, however, return on net investment is based on the economic concept that every dollar of investment must generate sufficient earnings to permit the investor to maintain his credit and attract the capital required for the particular investment involved and for future investments.

36. The fallacy of the AT&T approach is that it would make all short-term investments preferable to all long-term investments. And to limit, as AT&T has, the return to a planning period of five years will obviously lead to misleading conclusions. For example, if the investment will continue to earn income for 20 years, the first five years alone will invariably show that investment to be uneconomical. During those five years the unamortized portion of the investment will always be too great in relation to its annual earnings potential. In determining the long-run earnings requirement of a 20-year investment, it would be irrelevant that in its first five years earnings may be four percent of the then current level of net investment or that in its last five years they may be 30 percent. The true economic worth of the investment can only be measured on the basis of its full 20 year life. It follows that the base for return on investment must express the long-term average level of depreciated value of the assets in each class of property. Again, the error is so fundamental as to cast doubt on the validity of the AT&T's studies.

IV. Limitation of Relief to Suspension for Three Months or Less Followed by an Accounting Order Would not be Appropriate in the Circumstances and Would be Inadequate and Grossly Inequitable.

37. It might be contended that an alternative to rejection or stay of the proposed Telpak rate increases as requested herein would be a suspension for a period of up to three months pursuant to Section 204, followed by an accounting order. However such a procedure would be inappropriate, inadequate and grossly inequitable in the circumstances. So far as the aerospace companies and other Telpak customers are concerned, any relief which might be afforded by an accounting order would be wholly illusory. Of course, the Courts have recognized this generally to be the case. In Federal Power Commission v. Tennessee Gas Transmission Co., 371 U.S. 145 (1962), the Supreme Court stated:

"True, the exaction would have been subject to refund, but experience has shown this to be somewhat illusory It is, therefore, the duty of the Commission to look at 'the backdrop of the practical consequences [resulting] . . . and the purpose of the Act.'" 371 U.S. at 154, 155. 6/

6/ See Federal Power Commission v. Hunt, 376 U.S. 515, 524-525 (1964), citing with approval the principle, inter alia, that a refund does not afford sufficient protection to the ordinary consumer.

38. In the instant proceeding an accounting would be subject to far more serious inadequacies than have been judicially recognized as generally present. In this case, the substantial increases in Telpak rates initiated by AT&T Transmittal No. 10069 of March 25, 1968, were suspended for a period of three months and were made subject to an accounting order (FCC 68-711; 13 F.C.C. 2d 853). The accounting, which was provided by the Commission, was to be determined in the light of a hearing on the validity of such increased rates. Yet that hearing was deferred and has never been held. It is, of course, the fact that any accounting procedure is subject to numerous inherent bookkeeping complexities. Such complexities are multiplied geometrically if one accounting period is mounted on an earlier accounting period. The resulting complexities will necessarily be of such magnitude as to render the procedure completely unmanageable. For example, as a result of the increases which became effective pursuant to AT&T's Transmittal No. 10069 of March 25, 1968, users of Telpak services were required to effect a re-configuration of such services in the light of the revised and increased tariffs. In consequence, in any accounting order which deals with such Telpak services it would be extremely difficult to ascertain the amounts which would have been paid by any single user on the basis of the different configurations which they were compelled to abandon. With the complex, and diverse routes utilized by any single user, the pertinent computations

become extremely complicated and difficult. When the accounting order entails a determination of the comparative costs resulting from successive tariff increases with the further and additional reconfigurations which inevitably follow, the inquiry becomes unresolvable.

39. Further, the increase in Telpak rates will inevitably constitute a direct stimulus to the inflationary spiral, since the businesses affected must increase the price of their products, thus facing the entire public with higher prices. To the extent that the increase is not justified, it will have put pressure on the economy that should have been avoided. The Telpak increase is comparable to rises in steel and automobile prices and in the prime rate charged by banks, all of which have been actively opposed by the Executive Branch of the Federal Government. It is more directly inflationary than a strike in one industry for higher wages. Increasing Telpak rates before the need can be established is clearly in conflict with the public interest.

40. The foregoing relates to any Telpak customer and the public interest generally. The aerospace companies will suffer special irreparable injury from a further Telpak increase even if it is accompanied by an accounting order.

a) Following the institution of Telpak services, aerospace companies geared their company network planning to CCSA systems after many thousands of man hours and dollars were spent on

performance, cost and configuration studies. The determination to utilize the CCSA systems was dependent in turn upon the use of Telpak C and D trunking groups based on the assumed availability of such groups at the existing cost structure. However, now there is a very high probability that the effect of the successive increases will compel aerospace companies to abandon their CCSA systems. The impact of the increases may be illustrated by reference to The Boeing Company. The 1968 rate increase amounted to a 19% or \$948,000 yearly increase in Boeing's long-distance costs. The currently proposed increase will amount to an additional 18.9% or \$852,000 a year increase in Boeing's long-distance costs. The effect of the whole increase, 37.9% or \$1,800,000 may, therefore, make it necessary to abandon the CCSA system. A decision to abandon CCSA, once implemented, is irreversible for all practical purposes. Should Boeing implement such a decision, only to learn later that the Commission has disallowed all or part of the requested increase, and thereby reestablished economic attractiveness of CCSA, a minimum of eighteen months to two years would be required to restore the system to its present operational state (if CCSA facilities were still available). Many thousands of additional dollars per month would have been wasted in the interim, both capital and operating, in restoration of additional attendant services, plant space and utilities for the same, hiring and training of

operator personnel, planning and implementation of alternative service concepts, and additional supervision, accounting personnel, etc.

b) The abandonment of Telpak by aerospace companies will result in a grave impairment of the companies' technology because centralized computer services (data processing facilities) and like capabilities will no longer be economically feasible. For example, to an increasing degree aerospace companies concentrate their major data processing machines in a headquarters location and serve remote locations by terminal equipment connected to the computers by broadband transmission paths arranged from Telpak channels surplus to the immediate needs of the Company for CCSA purposes. Any change in Telpak costs sufficient to force an aerospace company to abandon its CCSA system would force their data processing organizations either to accept higher costs in order to sustain the otherwise economical centralized operational concept or to abandon this concept and return to a decentralized scheme. The likely consequence is a regressive, expensive and wasteful operation in an otherwise rapidly developing technical area. In addition, the inevitable effect of conversion from Telpak-based systems will be the overburdening of the public network (DDD) to which aerospace users will be required to turn. Presently, aerospace customers utilize a substantial percentage of the long distance facilities of AT&T on a private line basis. If this load is thrown

into the public network the resulting delays, interruptions and other breakdowns in service may result in severe dislocations. None of these consequences can be compensated for by an accounting order.

c) The Government generally requires aerospace manufacturers who do business with it to contract on a fixed price basis. It is however, impossible for business to contract with the Government on a fixed price basis and absorb increases in utility charges without special relief. In view of the Government's policy as to fixed price contracts, AT&T should not be permitted to impose substantial increases of doubtful legality upon the aerospace companies prior to a final determination of the legal questions. Further the contractual relationships of aerospace manufacturers with their commercial customers are also based on fixed prices, and deviations usually are allowed only when tied directly to changes in general indices, such as the cost of living.

d) AT&T represents that it is its intention to offset the additional revenues received from the increase in Telpak rates ". . . by adjustments in the rates for interstate message toll telephone service (MTT) and wide area telephone service (WATS)". This basis upon which the telephone company relies in purported justification of the rate increase, poses a hopeless dilemma for aerospace companies which is not met or aided in any respect by an accounting order. The

nature and amount of the "adjustments" in the rates for MTT and WATS are not disclosed; nor is the timetable for the proposed filing or effectiveness of such "adjustments" indicated. In view of the severe impact on the operations of aerospace companies resulting from the increase in Telpak rates, they must be apprised of the nature and timetable of the represented "adjustments" in MTT and WATS rates so that they may make intelligent plans for their future operations.

41. The Commission's one day suspension order of rate increases for program transmission services (Docket No. 18684; FCC 69-1038, October 6, 1969) and the imposition of an accounting order is not a precedent which supports similar limited relief in this proceeding. The facts relating to the two matters differ in significant respects. Thus, AT&T filed an increase in program transmission rates on February 1, 1968. However, the Chief, Common Carrier Bureau, requested AT&T to extend the effective date of the tariff in order to perform new studies of these services, and AT&T did voluntarily grant extensions until September 1, 1969. The Commission, on these facts, denied the requests of the networks for more extended relief holding that: ". . . [i]n view of the background associated with the present filing and noting the inordinate amount of time already expended in attempting to resolve this situation, [it] perceive[d] no advantage to the public in granting the extension of time requested." Id. at para. 4.

In order to ensure the rights of the parties, however, it entered a suspension order to enable it to compel an accounting. The instant filing presents no such comparable circumstances. The Chief of the Common Carrier Bureau requested no delay of AT&T and none was granted. To the contrary, one major rate increase in the rates for Telpak services became effective on September 1, 1968. And, as the Commission is well aware, that increase was put into effect without the benefits of a hearing. In addition, the program transmission tariffs have, in part, been subject to a major hearing, *i. e.*, Sports Network, Inc., Docket No. 16043 (FCC 68D-4), as well as close scrutiny by the Staff. The instant tariff filings have had no such comparable evaluation. Accordingly, the relief which AIA requests should not be affected by the Commission action in the program transmission tariff matter.

Summary Conclusion

42. In order to arrive at a resolution, in the public interest, of the questions presented by the instant controversy, it will be helpful to view the events and considerations detailed above in perspective. In broad terms, Telpak emerged as a new service offering about a decade ago as the competitive response of AT&T to private microwave. The Telpak offering proved to have all of the essential elements of a "good deal", since it served the interest of both the carrier

and its customers. AT&T was able to attract additional sources of revenues at relatively low additional cost, while at the same time meeting the competitive threat which it believed to be presented by private microwave. The customers, in turn, were able to obtain efficient and economical communications facilities which enabled them to meet their increasingly sophisticated and diverse communication needs. For example, aerospace companies were enabled to introduce and integrate computer and other data functions in their manufacturing activities, to coordinate the activities of remote installations and to better serve customers.

43. During the same period the Commission became increasingly aware that there might be inequitable and unjustifiable differences among the several AT&T service offerings in terms of costs, charges and contributions to revenue and that a basic re-examination of such services was required. Accordingly, the Commission initiated the General Rate Investigation proceeding in Docket No. 16258 with a view towards arriving at basic principles which would determine the appropriate overall rate to AT&T and of assuring that each of the services, including Telpak, bears its appropriate burden in contributing to such return. After the proceedings in Docket No. 16258 were initiated and during the pendency of these proceedings,

the Commission initiated the Telpak Sharing Proceeding (Docket No. 17457) to determine whether the sharing privileges accorded to specified, limited users were unduly discriminatory and, if so, the nature of the required remedial action. Neither of these proceedings has been decided. The Telpak sharing case remains pending and, the Commission has, in effect, terminated the General Rate Investigation with no resolution of the basic questions there presented. When it took that action the Commission relegated the resolution of the basic questions involved in that proceeding to specific rate making proceedings; and in the case of Telpak these questions have been specified in Docket No. 18128.

44. Accordingly, to date there has never been a determination by the Commission of the reasonableness and therefore the validity of Telpak rates. Understandably, the Commission was disabled from making any such determination because of its judgment that it was first required to determine matters relating to revenue contributions and rate making principles and also to make a determination concerning the legality of the sharing regulations. None of these determinations has yet been made even though the Commission has explicitly held that the prior resolution of these questions is an essential and necessary condition precedent to consideration and decision of Telpak rates.

45. Nevertheless, AT&T has moved forward in the area of rate revision. A year ago it filed a tariff revision which resulted in a substantial increase in Telpak rates. Although the validity of those rates was designated for hearing and the rates became effective subject to an accounting order, the hearing has never been commenced. It remains in a state of suspension. Now, the telephone company has come forward once again with a new and even more substantial proposed increase which it seeks to make effective November 1, 1969. The filing of successive and substantial rate increases in the present posture of the Commission's consideration of rate making poses the question whether the Commission should permit such rates to come into effect and remain in effect for some indefinite but certainly protracted period, or whether it should reject or stay the effectiveness of these rates on the terms requested by AIA.

46. It is respectfully submitted that the answer to this question is almost self-evident. If the question were to be determined on the basis of the respective equities of the parties, the answer clearly must be adverse to AT&T. It has enjoyed one rate increase which quite obviously is more than compensatory. If the question is to be determined on the basis of the power of the Commission, the answer is equally clear -- the Commission enjoys plenary authority to arrive at the result dictated by the equities. Certainly in any other circumstances if a

telephone company attempted to put into effect successive rate increases while the Commission was considering the legality of earlier ones, it could not be successfully contended that the only remedy available to the consumers would be a limited suspension, with or without an accounting; and that the Commission is powerless to take any steps to prevent the effectiveness of such successive increases. The fact that the Commission has taken steps to examine some of the essentials and that that effort is time consuming should not change the result. Indeed, the Commission has frequently imposed "freezes" of one type or another while it has undertaken such a basic effort. Thus, for example, in the broadcast field the Commission has frozen grants of new and modified authorizations for AM, FM and television stations, pending the adoption of basic rules governing such assignments. In the area of CATV regulation the Commission has, from time to time, imposed multiple freezes on the consideration of authorizations and waivers providing for the initiation and expansion of systems. Such freezes clearly evidence the plenary nature of the Commission's powers. They operate to inhibit the development of a whole area of communications activity, e.g., television, CATV, etc. What AIA here requests is a far less drastic application of that plenary power. It merely requests that no increase in Telpak, one small component of AT&T's interstate service which is, in fact, compensatory, be made subject to a rate increase until the reasonableness of that increase is established.

Prayer

WHEREFORE, the premises considered, Aerospace Industries Association of America, Inc., respectfully prays that the Commission promptly reject or stay, as hereinabove requested, the effectiveness of the increases in rates and charges for Telpak (Series 5000), Tariff F.C.C. No. 260, as proposed pursuant to Transmittal No. 10609 of the American Telephone and Telegraph Company, dated October 1, 1969, and that the Commission grant such further relief as may be just and proper. If the Commission has any doubts as to its power to grant, or the propriety of granting, the relief here requested, prompt oral argument before the Commission en banc is requested.

Respectfully submitted,

AEROSPACE INDUSTRIES ASSOCIATION
OF AMERICA, INC.

By /s/Arthur Scheiner
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/s/Harold F. Reis
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October 10, 1969

PETITION TO REJECT, OR REQUIRE OR SECURE
WITHDRAWAL OF, FURTHER TELPAK RATE INCREASES,
AND REQUEST FOR ORAL ARGUMENT

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of)	
	:	
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,)	
LONG LINES DEPARTMENT	:	Transmittal No. 10609
)	
Proposed Further TELPAK Rate Increases,	:	
Tariff F.C.C. No. 260, Series 5000 Service)	

To: The Commission En Banc

PETITION TO REJECT, OR REQUIRE OR SECURE
WITHDRAWAL OF, FURTHER TELPAK RATE INCREASES,
AND REQUEST FOR ORAL ARGUMENT

Come now the Air Transport Association of America (ATA), Aeronautical Radio, Inc. (ARINC), United Air Lines, Inc. (United), and Eastern Air Lines, Inc. (Eastern), collectively designated the "Airline Industry Parties", and pursuant to the provisions of Sections 4(i), 4(j), 201, 202, and 203 of the Communications Act of 1934, as amended,^{1/} Section 61.33 of the Commission's Rules and Regulations,^{2/} and the inherent powers, duties, and responsibilities of the Commission in implementation of and ancillary to the effective performance of its statutory authority,^{3/} respectfully petition that the Commission reject, or require or secure the withdrawal of, the further rate increases proposed in TELPAK (Series 5000) service, Tariff F.C.C. No. 260, under Transmittal No. 10609, dated October 1, 1969, by the American Telephone and Telegraph Company, Long Lines Department (AT&T).

^{1/} 47 U.S.C. §§ 154(i), 154(j), 201, 202, 203.

^{2/} 47 C.F.R. § 61.33.

^{3/} See United States v. Southwestern Cable Co., 392 U.S. 157 (1968), and pages 45-49, *infra*.

This is no routine protest looking toward the suspension and investigation of a routine tariff filing under Section 204 of the Communications Act. This is a petition for extraordinary relief occasioned and required by extraordinary circumstances. Where proposed grievous tariff increases are patently improper and invalid, it would clearly be most prejudicial to the parties affected, to Commission processes, and to the due administration of justice, and an abdication of the agency's statutory responsibilities, to permit them to become effective subject only to inadequately protective conditions. Where the basic infirmities and impropriety of a tariff filing are plain upon its face, the Commission does not require the panoply of a hearing to strike down the offending tariff rate increases.

Despite the basic holding of the original TELPAC Case that TELPAK C and D, if compensatory, are valid and appropriate tariff offerings justified by competitive necessity,^{4/} there seems to have arisen among at least some of the Commission's staff a persistent and permeating notion, clouding full and proper consideration on the undetermined merits, that TELPAK is a burden on other services, with the companion predilection that every TELPAK rate increase would necessarily be a benefit to these other services. Without impugning anyone's motives, but because of the extraordinary character of the issues raised herein, petitioners respectfully request oral argument in order that the Commission may hear directly from the interested parties on these important matters.

^{4/} Docket No. 14251, 38 F.C.C. 370, 395 (1964), 37 F.C.C. 1111, 1118 (1964), petitions for reconsideration denied, 38 F.C.C. 761 (1965), affirmed sub nom. American Trucking Associations v. FCC, 377 F. 2d 121 (D.C. Cir. 1966), cert. den. 386 U.S. 943 (1967).

I. Standing of Petitioners

1. The Air Transport Association of America is an unincorporated non-profit association composed of common carrier members constituting virtually all of the United States flag lines authorized and required under certificates of the Civil Aeronautics Board to provide regularly scheduled air transportation over established routes. As a principal objective, it is engaged in the promotion and development of air transportation to meet the present and future needs of the domestic and foreign commerce of the United States, the postal service, and the national defense. United and Eastern are two of its largest domestic trunk carrier members, having permanent operating rights for high-density traffic routes between principal traffic centers of the United States.

2. Aeronautical Radio, Inc., was organized in 1929 at the behest of the Federal Radio Commission for the purpose of providing and operating ground radio communications stations to furnish point-to-point communications and ground-to-aircraft communications needed to serve all airline companies and aircraft operators. Continuously since its organization ARINC has provided aeronautical fixed and mobile communications needed for airline and other aircraft operations. ARINC's communications facilities service all categories of intra- and inter-airline communications needs. Its stockholders include the major scheduled air carriers of the United States, helicopter operators, foreign flag carriers, corporation aircraft operators, and other aviation-oriented companies. ARINC is vitally interested in the development of a nationwide aeronautical communications system which fully, efficiently, and economically meets the communications needs of the air

transport industry.

3. The airline industry, a regulated industry licensed to operate in the public interest, is a major dynamic force in the American economy. In 1968, 38 scheduled United States carriers, with 2,301 fixed wing aircraft in service, flew 150.1 million revenue passengers, 113.9 billion revenue passenger miles, 2.8 billion freight ton miles, 1.2 billion mail ton miles, and 105.1 million express ton miles. The airlines averaged 14,612 scheduled daily flights, serving 524 domestic and 166 international points, in 1963. It is projected that by 1975, the airlines will be flying 300 million passengers and 10 billion ton miles of cargo at speeds of 1,400 miles an hour.

4. Essential to the operations of the airline industry and its continuing growth is the availability of "a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges".^{5/} The air transportation industry's communications system includes, among other facilities, 2 million circuit miles of leased telephone, teletype, and data transmission lines and connecting equipment, and approximately \$250 million in data processing equipment currently owned or leased for passenger reservation requests. The AT&T Interstate Private Line Market Study, Tab 4, submitted with Transmittal No. 10609 reflects that the airlines are the largest customers of the Bell System interstate

^{5/} Section 1 of the Communications Act of 1934, as amended, 47 U.S.C. § 151.

private line market after the Government, with 4.8 of the 36.5 million total point to point channel miles. The airline industry and components thereof have vigorously participated in the various proceedings before the Commission relating to the use by the air transport industry of the private line and TELPAK communications services offered by AT&T, including the Private Line Case (Docket No. 11645), the TELPAC Case (Docket No. 14251), the TELPAC Sharing Case (Docket No. 17457), and the AT&T General Rate Investigation (Docket No. 16258), and are intervenors in the Interim TELPAK Rate Increase Case (Docket No. 18128).

5. The airlines would be most substantially and seriously aggrieved and adversely affected as parties in interest if the rate increases proposed are permitted to become effective. In Docket No. 18128, TELPAK users have already been subjected to a substantial increase in rates, subject to a 90-day suspension, hearing, and accounting;^{6/} the proposed further rate increases would impose a most substantial "second bite" on all TELPAK users:

	<u>Original Tariff</u>	<u>Interim Tariff 9/1/68</u>	<u>Proposed Tariff 11/1/69</u>
Base Capacity (Per Airline Mile Per Month)			
--TELPAC C (Type 5700)	\$25.00	\$28.00	\$30.00
--TELPAC D (Type 5800)	45.00	60.00	85.00
Service Terminals, Connecting Arrangements (Per Month)	15.00	25.00	35.00
--Additional Terminals and Arrangements (Per Month)	5.00	10.00	15.00
Telegraph/Telephone Equivalency	12 : 1	6 : 1	2 : 1.

^{6/} Docket No. 18128, FCC 68-388, 33 Fed. Reg. 5900 (1968), FCC 68-711, 13 F.C.C. 2d 853 (1968), FCC 68-756 (1968)

6. It has been most conservatively estimated, in testimony in Docket No. 16258, that the cumulative result of both bites, if permitted to become and remain effective, would increase TELPAK costs by more than double, by almost \$25 million per year, even at August, 1967, levels of usage (for purposes of comparison, more than the total annual budget of the Federal Communications Commission):

	<u>Original Tariff</u>	<u>Interim Tariff 9/1/68</u>	<u>Proposed Tariff 11/1/69</u>
TELPAK Charges	\$20,484,000	\$32,330,928	\$45,275,520
Amount of Increase	* * * *	11,846,928	24,791,520
Percent of Increase	* * *	58%	121%.

With the increasing growth in the communications requirements of the airlines, the impact would be even more severe. Thus, the impact of the increases would not be limited or modest, but most grievous and insufferable.

II. The Proposed Further Rate Increases Are Predicated Upon
An Excessive, Unauthorized 8-1/2% Rate of Return

7. In the material accompanying its filing, AT&T has acknowledged, under the tab "Cost Data": "The LRIC determinations for the analyses summarized in Attachments A through C include an amount for return on investment at an 8-1/2% rate." The Commission determined, in Phase I-A of the AT&T General Rate Investigation, Docket No. 16258, that 7 to 7-1/2% is the range of reasonableness of AT&T's rate of return on its interstate operations.^{7/} The Commission has never authorized a higher rate of return, and it appears unlikely that it will do so, certainly not as high as the 8-1/2% rate of return postulated by AT&T.

8. The proper determination of long run incremental costs (LRIC) is a condition precedent for the proposal and consideration of any rate adjustments.^{8/} Manifestly, the rate of return is an essential element of a proper determination of LRIC. This excessive return item alone, including the associated income tax component, amounts to approximately \$14.5 million in the LRIC offered in support of the proposed rates. No reason is given, and no facts set forth, upon which the carrier relies in justification for

^{7/} FCC 67-776, 9 F.C.C. 2d 30, 88, 114-16 (1967); FCC 67-1047, 9 F.C.C. 2d 960 (1967).

^{8/} See "Statement of Ratemaking Principles and Factors in Docket No. 16258, Phase I-B", FCC 69-842, Appendix A, 18 F.C.C. 2d 761, 768 (1969).

reliance upon an excessive and unauthorized rate of return to increase charges. The tariff filing thus fails to comply with Section 61.33 of the Commission's Rules and Regulations and, like the tariffs increasing the line charges for AM and FM broadcast service, must for like reason be rejected.

III. The Proposed Further Rate Increases Would Pyramid AT&T's Excessive Unauthorized Windfall Profits to One-Quarter of a Billion Dollars

9. In approving a rate of return for AT&T's interstate services in the 7 to 7-1/2% range, the Commission determined that AT&T was earning an excessive rate of return, and ordered that interstate revenues be reduced by \$120 million.^{9/} Notwithstanding the reduced reductions ultimately made, AT&T has continued to enjoy earnings "well in excess of 8% on interstate operations",^{10/} continuing into 1969,^{11/} so that AT&T realized a rate of return of 8.3% for the first half of 1969, with the anticipation of an 8.5% in 1970 or 1971, and an estimated return at 8.1% for the year 1969, or from \$150 to \$167 million in excess of the higher limit on its authorized rate of return.^{12/}

10. Presumably out of embarrassment, AT&T has represented to the Commission at "continuing surveillance" meetings during September, 1969, that "it seeks no rate increases".^{13/} In a letter accompanying the proposed

^{9/} Docket No. 16258, Phase I-A, FCC 67-776, 9 F.C.C. 2d 30, 88, 114-16 (1967); FCC 67-1047, 9 F.C.C. 2d 960 (1967).

^{10/} FCC 68-667, 13 F.C.C. 2d 716 (1968).

^{11/} Wall Street Journal, February 24, 1969.

^{12/} "Continuing surveillance" meetings, September, 1969.

^{13/} See Letter of Chairman Hyde to Mrs. Bell Myerson Grant, Commissioner of the New York City Department of Consumer Affairs, FCC Report No. 3789, September 19, 1969.

rate increases of Transmittal No. 10609, AT&T acknowledges: "It is estimated that on the basis of the end-of-1969 market, these rate increases [for video and audio, TELPAK, and TWX] would increase the Bell System's interstate revenues by approximately \$87 million on an annual basis".

Piling Pelion on Ossa, AT&T thus seeks to pyramid its excessive profits of \$87 million in new rate increases on existing excess profits of about \$167 million, for windfall excess profits of one-quarter of one billion dollars. The letter from AT&T then suggests "it is our intention to offset this [\$87 million] revenue increase by adjustments" in MIT and WATS. Even if there were no other questions here presented, the least the Commission should do would be to require that all such pre-existing excess profits be wiped out before permitting the filing of any rate increase of any significance. And, of course, there are other very serious questions hereinafter presented.

IV. The Proposed Further Rate Increases Would Pyramid Rate Increases Without a Determination of the Propriety of Previous and Existing Rates

A. The Proposed Further Rate Increases Violate the Understanding That There Would Be No Further Rate Increases Pendente Lite

11. In the case of program and video transmission services, AT&T filed on February 1, 1968, revised tariff schedules for substantially increased charges which were to have taken effect on April 1, 1968, but were successively postponed until April 1, 1969, and then October 1, 1969.^{14/} When a petition for relief was filed on September 4, 1969, by broadcasting interests

^{14/} FCC Report No. 3439, March 21, 1969.

against proposed rate increases for program transmission services, AT&T specifically observed in its opposition, p. 7:

"No increase in the level of rates for the program transmission services has yet become effective despite the fact that such an increase was first filed on February 1, 1968. * * * [T]he time has now come that an increase in the rate level for program transmission services should be permitted to go into effect."

Thus, when the Commission on September 24, 1969, permitted the revised tariffs by AT&T setting a new structure for television program rates (Series 7000) to become effective on October 2, 1969, on one day's suspension, with an accounting order, one of the considerations in the filing being the issuance of an initial decision on January 25, 1968, following hearing in the Sports Network Case, Docket No. 16043, this was a first and only increase in the general rate level for the program transmission ^{15/} services.

12. TELPAK users have enjoyed no such immunity from interim TELPAK rate increases. On September 1, 1968, there became and now remain effective most substantial TELPAK rate increases, about midway between the original rates and the increases now proposed. The propriety of those interim rates and AT&T's attempted justification therefor were of such doubtful validity that the Commission suspended the interim tariff increases for hearing in a newly established case, Docket No. 18128, ^{16/} to the full statutory authority of Section 204 of the Communications Act, ^{17/} and thereafter ordered an accounting. ^{18/} On the explicit basis that it still remained to

^{15/} FCC Report No. 3799, September 24, 1969.

^{16/} FCC 68-388, 33 Fed. Reg. 5900 (1968).

^{17/} 47 U.S.C. § 204. Cf. FCC 68-872, 14 F.C.C. 2d 564 (1968). This petition to reject is not based on the suspension provisions of Section 204.

^{18/} FCC 68-711, 13 F.C.C. 2d 853 (1968).

be determined whether the original TELPAK rates were compensatory, as the only remaining issue from the original TELPAC Case, Docket No. 14251, and on the information before it, the Commission ruled that it was unable to determine that the increases were or would be just and reasonable or otherwise lawful, and that the rights and interests of the public might be adversely affected if the rates were permitted to become effective on the date specified.^{19/}

13. In material accompanying the present filing, Transmittal No. 10609, under "Rate Adjustments", page 2, AT&T notes that it had originally proposed higher rates in Transmittal No. 10001. Mirabile dictu, after extensive, intricate, and refined cost and market studies, the rates now proposed fortuitously turn out to be identical to those originally proposed almost intuitively more than two and one-half years ago in January, 1967. AT&T also asserts that it filed lower interim rates to permit users time to adjust to the increases. The record should be clear by now that the proposed rates were then reduced not because of any largesse or magnanimity of the carrier, but because the magnitude of the increase was completely indefensible, in light of then and now still unresolved issues.

14. Thus, the interim rate increases were filed with the understanding that they were to remain in effect unless and until the Commission permitted some different level, after appropriate findings in some formal proceeding. There can be no confusion that the formal proceeding is now

^{19/} FCC 68-388, 33 Fed. Reg. 5900 (1968).

Docket No. 18128, and in designating the interim rate increases for ^{20/} hearing, the Commission itself explicitly stated:

"[I]t should clearly be understood by the TELPAK users, that, in the event a hearing record indicates that increases in the level of TELPAK rates are justified or required, or that the TELPAK classification should be eliminated, any increases occasioned thereby will become effective without delay."

The hearing record is yet to be made, and the Commission is yet to make any appropriate findings. In short, in filing the further rate increases at this time, AT&T has reneged on this understanding.

B. There Remain Undetermined Issues Which Must Be Resolved Before Further Rate Increases Can Be Permitted to Become Effective

15. There has never been a determination of the underlying compensatory issue on the original TELPAK C and D rates, the interim rate increases, or the various allegedly supporting cost studies, all of which must be resolved before any further successive rate increases, interim or otherwise, can be imposed. ^{21/} In the tentative decision in the TELPAK Case, ^{22/} in the final decision, ^{23/} in the Court of Appeals decision on appeal, ^{24/} in the Commission order winding up the TELPAK Case, ^{25/} in its order on reconsideration.

^{20/} FCC 68-388, 33 Fed. Reg. 5900 (1968). (Emphasis added)

^{21/} For convenience, there is attached to this petition as Appendix A a chronological recitation of the events and circumstances defining the scope and progression of the TELPAK issues in Commission proceedings, while AT&T has continued to receive a rate of return beyond that authorized by the Commission.

^{22/} 38 F.C.C. 370, 395 (1964).

^{23/} 37 F.C.C. 1111, 1117-18 (1964).

^{24/} American Trucking Associations v. FCC, 377 F. 2d 121, cert. den. 386 U.S. 943 (1967).

^{25/} FCC 66-1005, 7 F.C.C. 2d 30 (1966).

tion,^{26/} in the order designating the interim rate increases for hearing,^{27/} and in the order for an accounting,^{28/} the Commission has consistently affirmed that there still exists an undetermined issue whether the original TELPAK rates are and have been compensatory, and that the parties are entitled to a hearing and a determination on that issue. The "Statement of Ratemaking Principles and Factors in Docket No. 16258, Phase I-B", unanimously adopted by the participating parties and approved by the Commission, made specific provision that "[a]ny unresolved issues of docket 14251, which have been incorporated into docket 16258 for determination [i.e., the compensatory character of the original TELPAK C and D rates], will be incorporated into docket 18128 for further hearing and determination."^{29/} Thus the compensatory character of the original TELPAK rates, and the propriety of the interim rate increases, still remain for determination in Docket No. 18128, and it is only after a Commission determination on the hearing record may AT&T be permitted, if justified by the hearing record,^{30/} to file for effectiveness any further rate changes.

16. Likewise, in the Service Point Case,^{31/} the Sports Network Case,^{32/} in its order implementing the TELPAK decision,^{33/} in its order on recon-

^{26/} FCC 66-1188, 6 F.C.C. 2d 177 (1966).

^{27/} FCC 68-388, 33 Fed. Reg. 5900 (1968).

^{28/} FCC 68-711, 13 F.C.C. 2d 853 (1968).

^{29/} FCC 69-842, 18 F.C.C. 2d 761, 768 (1969).

^{30/} FCC 68-388, 33 Fed. Reg. 5900 (1968).

^{31/} FCC 66-71, 2 F.C.C. 2d 359 (1966).

^{32/} FCC 66-403, 3 F.C.C. 2d 618, 624 (1966), FCC 67R-62 (1967) (Review Board).

^{33/} FCC 66-1188, 7 F.C.C. 2d 30 (1966).

sideration thereof,^{34/} and in designating the TELPAC Sharing Provisions for hearing,^{35/} the Commission has said again and again that internal rate structures and individual rates can only be properly considered after there has been a determination of applicable general ratemaking principles and factors, of the overall rate level of each class of service, and of the relationships of rate levels among the various classes of service. In ordering an accounting on the interim rate increases, the Commission emphasized that these matters, in connection with the existing and the then proposed interim rates, were of "threshold^{36/} essentiality" to a determination of internal rate structure matters:

"It is our expectation that upon completion of the record in Phase I-B in these respects, the Commission will be in a position to prescribe appropriate principles or guidelines for the determination of the over-all revenue objectives that are to be met by Respondents in the design of each of their principal rate classifications. It is also our intention to determine the extent to which each of the existing or proposed rate classifications accord with, or fall short of, meeting those principles and guidelines."

"* * *

"Thus, with respect to Respondents' rates for TELPAK service, including those now under suspension and investigation in Docket No. 18128, we will determine in Phase I-B of Docket No. 16258 whether competitive or other valid considerations justify the pricing discrimination existing in the TELPAK offering; and, if so, whether Respondents' existing or proposed rates for TELPAK will make an appropriate contribution to Respondents' total interstate revenue requirements. These determinations with respect to the revenue objectives appropriate to TELPAK and other services are, in our opinion, of threshold essentiality to a determination of the reasonableness and lawfulness of the specific rates and rate relationships within the individual rate structures. It is also our opinion that we can arrive at these threshold determinations without simultaneously resolving all other questions."

^{34/} FCC 66-1188, 6 F.C.C. 2d 177 (1966).

^{35/} FCC 67-61232 Fed. Reg. 7643, 8 F.C.C. 2d 178 (1967).

^{36/} 68-711, 13 F.C.C. 2d 853 (1968) (Emphasis added)

The transposition of these matters from Docket No. 16258, Phase I-B, to Docket No. 18128, as they relate to TELPAK and Private Line, make the observations no less valid and the order of procedure no less essential.

17. In all this, the inability to reach a determination on these "threshold" issues can in no wise be ascribed to the TELPAK users. From the beginning, it may be noted that they had urged that the issue of the compensatory character of the original TELPAK rates be resolved in the TELPAK Case, Docket No. 14251, but their petitions were denied and the unresolved and remanded issue was shifted to Docket No. 16258 for determination.^{37/} As a pragmatic consideration, it must also be recognized that a full and fair determination of the propriety of a rate level would be immeasurably compromised if not one, but two, higher levels were superimposed for consideration in the same proceeding.

V. The Proposed Further Rate Increases Violate the Agreement on Ratemaking Principles for the Meaningful Participation of Interested Parties

18. At the final date of hearing of record in Phase I-B of Docket No. 16258 on May 28, 1969, there was presented for the record the "Statement of Rate-Making Principles and Factors in Docket No. 16258, Phase I-B" after the Hearing Examiner polled the participating parties unanimously approving the agreement. The parties present were thus in effect parties signatory to a contractual agreement, including representatives of the carrier and of the Chief of the Common Carrier Bureau. In approving the agreement, the Commission itself likewise became a party to the agreement.^{38/}

^{37/} FCC 66-1188, 6 F.C.C. 2d 177 (1966).

^{38/} FCC 69-842, 18 F.C.C. 2d 761 (1969).

19. One of the essential components of the agreement was that AT&T was to undertake studies of long-run incremental costs (LRIC) and fully distributed costs (FDC), as both relevant in considering the appropriate rate levels of specific classes of service, but that the development of these studies rested upon procedures yet to be worked out. Thus, in approving the agreement, the Commission observed: "We note, in this connection, that the statement contemplates the submission of both fully distributed and incremental cost studies, based on methodologies to be developed."^{39/} And again: "It is readily apparent that the techniques or methodology for developing the data needed to test and apply long-run incremental cost principles require formulation."^{40/} And to the parties intervenor whose consent was necessary to a settled disposition of Phase I-B of Docket No. 16258, it was a requisite to the agreement that they have some meaningful participation in the development of those techniques and methodology. Thus it was that Paragraph 11 of the statement of principles stated:^{41/}

"In order to determine l.r.i.c. and f.d.c. for the major categories of interstate services, the Bell System, in consultation with the FCC staff, will undertake to develop appropriate methods to be used in the production of l.r.i.c. and f.d.c. studies at regular predetermined intervals and will go forward as promptly as possible to produce up-to-date cost data. By such formal or informal procedures as the Commission deems appropriate, interested persons will be afforded a timely opportunity to express their views with respect to the formulation of the appropriate methods."

^{39/} 18 F.C.C. 2d at 763. (Emphasis added)

^{40/} 18 F.C.C. 2d at 764. (Emphasis added)

^{41/} 18 F.C.C. 2d at 767.

Obviously this "timely opportunity to express their views" was understood to be no mere formalism and empty ritual, but actual active involvement in the development of the costing methodology.

20. The agreement further contemplated that this involvement was to continue through to final formulation. Thus Paragraph (3) of the procedures for implementing the principles provided:^{42/}

"No carrier initiated rate level increases will be filed until the new cost studies described in paragraph (2) have been completed and made available to the parties hereto."

Manifestly this provision, to be meaningful, encompassed much more than the physical delivery or availability of a mass of documents on the day of filing, or a business day or two prior thereto. When the tariff filings are made, the underlying studies become promptly available for inspection to interested parties as a matter of right, dependent not one whit upon the munificence of the carrier to effect their production. Surely it cannot be contemplated that the parties were earnestly negotiating for the bagatelle of a prior notification for filing measurable by hours and serving no practical purpose. Even a casual exposure to the volumes of testimony, exhibits, and underlying papers in Docket No. 16258 would have been adequate to put the parties on notice, in negotiating the agreement that the normal statutory time tables of thirty days' notice before effectiveness and ninety days' suspension would be hopelessly insufficient for any useful digestion, analysis, and evaluation of the mass of material produced. The clear and unmistakable import of the agreement, it is

^{42/} 18 F.C.C. 2d at 768. (Emphasis added)

submitted, reinforced by the extensive history of prior administrative litigation and negotiation, is necessarily that the parties under the statement of principles have negotiated a contractual right to have the studies submitted, assimilated, tested, probed, evaluated, discussed, and, where appropriate, modified, over the reasonable period of time necessary to complete informed as well as informal consultations with carrier and staff, before any consideration could be given to the tender of formal tariffs for statutory effectiveness.

21. Whatever its rights in the abstract to file tariffs might otherwise be in the more usual situation, the carrier has here contractually modified or circumscribed such authority as it might otherwise have to proffer tariff changes, by an agreement to which not only its customers but also the Common Carrier Bureau and the Commission itself are now parties. It is well settled that a public utility may even agree by contract to a rate which would afford it less than a fair return, and would not be entitled to be relieved from an improvident bargain unless the rates were so low as adversely to affect the public interest.^{43/} Here there is no question of an improvident bargain, and the carrier is already earning \$167 million in excess of its authorized return. To the extent that tariff reductions are required, the agreement is no barrier to their prompt voluntary filing or Commission prescription. If tariff increases are to be proposed, however, notwithstanding the excessive return already being realized, the parties are entitled to the carrier's full compliance with the terms and intent of the agreement.

^{43/} FPC v. Sierra Pacific Power Co., 350 U.S. 348, 355 (1956); Nichols & Welch, Ruling Principles of Utility Regulation, Rate of Return, Suppl. A (1964), p. 13.

22. In this case, there has been a failure of compliance with both provisions of the agreement. There have been, it is true, general meetings attended by representatives of the staff, AT&T, and interested users on June 11 and 30, and September 18-19, 1969, and meetings between AT&T and airline representatives on June 10 and September 10, 1969. Insofar as there were any descriptions, however, of the methods and techniques being pursued by AT&T, so that the parties would have any intelligible opportunity to express their views, the descriptions given of the methods during their formulation were generally vague, lacking in specificity, and suggestive only that different methods would be employed without describing the methods. For example, an AT&T document on "Changes involved in Costing Methods for new LRIC Study" distributed in June declared: "Modifications in the procedures for determining various other expense factors (e.g., traffic, revenue accounting, sales and local commercial, advertising, and other commercial expenses) will be undertaken." The LRIC was completed for all practical purposes before a description in any substantial detail was presented of the procedures which AT&T had already employed (the explanation given was that the matters involved such complexities and new paths that the techniques and methodology were unfolding and being developed as the studies proceeded). Thus, any changes which might have been suggested when details of the procedure were finally disclosed were out of the question because of the self-imposed deadline of October 1, 1969, for presenting the cost studies to the Commission. Indeed, the first disclosure of the costs produced by the methodology unilaterally adopted by AT&T was not made until two days before the filing of the proposed rate increases.

23. At the same time, no meaningful "timely opportunity" was being provided to the parties "to express their views" under the agreement. The remarkable identity of the rates now proposed, after voluminous inquiries on a December, 1971, basis, drawing upon projections into 1975 and 1980, with those proposed almost three years ago without benefit of these studies, invites inquiry whether the users were participating in more than a formal exercise for the record. While the methodology was being developed, the parties were obliged to carry the laboring oar at the conferences to present views, comments, and suggestions while representatives of the carrier listened politely without any informative disclosure of the methods being employed to permit a two-way dialogue. When the procedures, already being finalized, were subsequently described, they disclosed, as set forth infra, that the views of the parties have been largely ignored.

24. In the recent action of September 17, 1969, rejecting for filing new tariffs (Series 6000) increasing the line charges for AM and FM broadcast service, the Chief of the Common Carrier Bureau stated, "we fail to find any statement in either the transmittal letter or supporting data 'showing in detail the reasons' for such changes or any statement of facts upon which the carrier relies in justification for increased charges as ^{44/} required by Section 61.33 of our Rules." Similarly, in filing the proposed TELPAK further rate increases, the carrier in a number of particulars, including those suggested by the parties but ignored by the carrier, has also failed to show in detail the reasons for the changes or any statement of facts on which it relies to justify the increased charges.

^{44/} FCC 37780, September 19, 1969. (Emphasis added)

VI. The Cost Studies Do Not Comply with the Agreement
on Ratemaking Principles on Basic Costing Procedures
To Be Followed

A. No Reasons or Facts Are Given Upon Which the
Carrier Relies in Justification for Increases
in Telegraph/Telephone Equivalency Which On
Their Face Are Unrelated to Costing Considerations

25. In the present state of the art, technology permits up to eighteen telegraph channels to be derived from one voice (telephone) channel. Under the present interim tariff, a customer may derive only 6 telegraph channels from one voice channel, i.e., he must pay three times as much, for three telephone channels, for the same 18 telegraph channels. Under the proposed further rate increases, the telegraph/telephone equivalency is 2:1, so that a user must pay for nine telephone channels where technology would require him to use only one telephone channel for the same 18 telegraph channels. While technological developments permit more telegraph channels to be derived from the same one telephone channel, AT&T seeks to impose higher charges by permitting fewer telegraph channels to be derived from a single voice channel.

26. In the material accompanying the filing for further rate increases, under "TELPAC Rate Adjustments", page 6, AT&T acknowledges that "considerably more than two telegraph channels can physically be derived from a voice channel," but avers that "this is offset by the fact that terminal costs for telegraph channels are considerably higher than those for telephone. * * * In TELPAK, We have reflected this characteristic by keeping the telephone and telegraph service terminal rate levels the same (\$35), and maintaining the overall revenue/cost balance through adjustment of the equivalency to 2 to 1." AT&T thus contends that the total costs as between telegraph and

telephone, including terminal and line haul charges, are in the ratio of 2:1. However, although the difference lies almost entirely in terminal costs, the adjustment is made not in the terminal costs, but in assessing the line haul charges, where, from a technological standpoint, the equivalency could be as high as 18:1. AT&T thus violates a cardinal principle, enunciated in the Private Line Cases, that rates which depart^{45/} from cost relationships must be clearly justified:

"Cost considerations. -- Generally, we believe that the cost of providing service constitutes the most reliable criterion available for determining just, reasonable, and nondiscriminatory rates. We shall regard costs either as directly controlling in the fixing of rates herein or as reference points from which to measure the extent of any departures therefrom, based on other ratemaking considerations. Rates which depart from cost indications must be clearly warranted in order to satisfy our statutory standards of lawfulness."

AT&T has, therefore, failed to meet the test of Section 61.33 of the Commission's Rules and Regulations,^{46/} requiring justification for changes,^{47/} as defined by the Private Line Case.

B. No Reasons or Facts Are Given Upon Which the Carrier Relies in Justification for the Subsidization of Service Terminals Charges At Below Long Run Incremental Costs, With the Resulting Imposition of the Burden on Line Charges for TELPAC C and TELPAK D

27. The document "Long-Run Incremental Cost Analyses of TELPAK, Private Line Telephone, and Private Line Telegraph Services", under the tab "Cost Data" in the material attached to Transmittal No. 10609, is

^{45/} 34 F.C.C. 244, 297 (1961). (Emphasis added)

^{46/} 47 C.F.R. § 61.33.

^{47/} 34 F.C.C. 244, 297 (1961).

conspicuously lacking in any detailed comparison between the costs and revenues associated with the line haul and the terminal components of the respective TELPAK offerings. In Attachment C thereto, AT&T attempts to demonstrate the total estimated revenues and total estimated costs under the present, the past, and the proposed rate schedules. Page 2 of Attachment C summarizes the incremental unit costs applied to the total market quantities for line haul TELPAK C and D, and terminals. It does not attempt to compare the revenues of these respective components.

28. Attachment Table I of this petition uses the market work papers supplied on September 29, 1969, to construct a table which does compare the revenues as well as the costs of the respective line haul and terminal elements of TELPAK, accepting AT&T's data for this purpose. The table reveals a shocking disproportionality between revenues and costs. Under all three of the rate schedules, using AT&T's own figures at face value for these purposes, TELPAK C charges are greatly in excess of its associated costs (LRIC) -- under the proposed rate schedule, TELPAK C revenues would exceed TELPAK C costs by almost three times (even under present rate schedules, TELPAK C would earn a profit, under AT&T's own figures, well in excess of the total estimated cost for the line haul service). On the other hand, terminal charges account for little over half the costs associated with terminals under the present rate schedule, and even under the highly profitable proposed rate schedule, terminal revenues cover only three-quarters of the costs associated with terminals. Only the TELPAK D line haul revenues appear to balance their corresponding costs (again assuming arguendo the accuracy of AT&T's figures), and then only under the present schedule -- under the proposed rate schedule, the TELPAK D line haul charges will yield

a profit of over sixty per cent over and above the built-in 8-1/2% return on associated net investment.

29. It is no answer for AT&T to state in its document, pages 2-3, "Because of the integrated nature of the Telpak systems and the interaction of cost elements as between line haul and terminal, it is not practicable to isolate each cost element and attribute its incurrence specifically to either the line haul or the service terminal." This Commission said^{48/} in the Private Line Cases:

"Obviously, mathematical precision is unattainable. This is apparent from the complexity of the cost allocation problems, described in detail above. However, reliability of the cost criterion is not diminished because it is not mathematically precise."

30. If the purpose of rate increases is to recover increased costs, then the increases should bear some reasonable relationship to the alleged increased costs. The effect of both the telegraph/telephone equivalency change from 6:1 to 2:1, in contradiction to technology, and the disproportionate increases on TELPAK line haul charges, serve to penalize the long-distance user, by requiring him to absorb much of the high cost terminals which are used in far greater proportion by short haul communications users.

31. The failure of AT&T to relate its proposed further rate increases to the costs of its respective service components also indicates that AT&T has arrived at the proposed rate increases with no real consideration of the cost studies which it has completed which purport to support those

^{48/} 34 F.C.C. 244, 297 (1961).

increases. AT&T has shifted from the full additional cost analysis supporting the rate increases originally proposed on January 9, 1967, to a relative revenue-cost incremental approach, representing an entirely new justification for the alleged cost increases, but the results are presumed to be the same, and the same rate schedule proposed. The shift in argument, and the failure to adjust rate schedules properly to reflect component costs, both clearly confirm that the cost studies have been used as a rationalization for a prior result rather than as a basic foundation to ascertain appropriate rate schedules.

C. No Reasons or Facts Are Given Upon Which the Carrier Relies in Justification for Failing to Determine, as the True Measure of LRIC, the Revenue-Cost Relationship Under Each Test Rate As Against the Resulting Relationships If No TELPAK Were Offered

32. An essential point of agreement in the "Statement of Rate-Making Principles and Factors in Docket No. 16258, Phase I-B" is the provision of paragraph 12, "The rates for any category of service should produce a rate level which is not below l.r.i.c., or, where appropriate, not below avoidable costs," unless supported by a Commission determination that it is required in the public interest.^{49/} The technique for measuring LRIC as the rate floor would be to compare the levels of Bell System revenues and costs under each of the alternative rate schedules against the cancellation of all TELPAK service. Such an analysis would provide a sum total of LRIC costs attributable to the entire TELPAK service and would

^{49/} FCC 69-842, 18 F.C.C. 2d 761, 767 (1969).

include due consideration of the cross-elasticities with other communications services, both within and outside the Bell system.

33. Not until September 29, 1969, two days before the tariff offering, and after repeated urging by the airline parties, did AT&T furnish any calculation of the sum total of LRIC costs attributable to TELPAK which now appears as Attachment C to "Long-Run Incremental Cost Analyses of TELPAK, Private Line Telephone, and Private Line Telegraph Services" under the tab "Cost Data". The statement, however, fails to meet the minimum requirements of the agreement, and of the facts necessary as a justification for a rate increase because: (1) It lacks market back-up to measure the cross-elasticities of the respective services, a necessary element in measuring the LRIC rate floor; and (2) It reflects only two of the six alternative rate schedules considered.

D. No Reasons or Facts Are Given Upon Which the Carrier Relies in Justification for Its Failure to Measure the Effect of an MTT Rate Reduction

34. With excess earnings of \$167 million above its authorized rate of return, it may reasonably be anticipated that there will be reductions in the MTT service of AT&T. Even if it could be correctly stated that variations in private line rate schedules would have no significant influence on the unit costs in the Bell System, the parallel assumption that MTT rate changes would not influence unit costs would not be correct. Since MTT constitutes 80 percent of Bell's interstate service, a rate

reduction in MTT, even with a relatively minor demand elasticity, could increase the rate of system growth far beyond that which could be generated by the rate alternatives for TELPAK.

35. Nevertheless, AT&T has curiously performed no forward-looking MTT market studies -- there has been no explicit estimate of the size or composition of the MTT market in the 1970 decade either under the present rate schedules or the impending rate reductions. In view of the enormous influence of a change in MTT rates on the over-all rate of expansion of the Bell System, this failure to consider the effect of any MTT reduction impairs the validity of the entire LRIC study as a useful realistic analysis.

E. No Reasons or Facts Are Given Upon Which the Carrier Relies In Justification for Its Application of a Linear Cost Function Inconsistent with LRIC

36. One of the fundamental principles of incremental costing is that any acceleration in the rate of growth will result in a lower unit cost as the economies of scale come into play at a more rapid rate. Conversely, a slower rate of growth results in not as low unit costs as the effects of economies of scale are retarded. Since the varying rate schedules can affect the rate of growth of the Bell System, each rate schedule should be analyzed in terms of the separate cost functions which it creates. Rate schedules which stimulate rapid expansion of the system should involve lower unit costs than those which repress system expansion.

37. However, the cost study which AT&T has offered in support of its rate proposals applies a single linear unit cost to all levels of rate increase. Since no "sensitivity tests" have yet been performed to examine the effect on unit costs of varying rates of system expansion, there is no support for AT&T's assumption of linearity. AT&T has thus applied a linearity technique clearly inconsistent with LRIC which it has been required to study under the agreement of Docket No. 16258.

F. No Reasons or Facts Are Given Upon Which the
Carrier Relies in Justification for Its
Failure To Apply a Factor Recognizing the
High Density Characteristics of TELPAK

38. Beginning in 1967, in informal discussions and in formal testimony in Docket No. 16258, the airline parties have pointed out to AT&T that its failure to recognize the high-density characteristics of TELPAK communications, as compared with private line or MTT, substantially distorts AT&T's cost analysis. In AT&T's methodology, the assignment of line haul facilities to the respective services is based on an analysis of the mix of facilities on each of the ten mileage bands for all classes of service, without distinction as to the inherent demand characteristics of any of the several services.

39. TELPAK is by its very nature a volume service. Given its base capacity requirements of 60 and 240 channels, it cannot help but generate its own high density along the routes upon which it operates. Furthermore, the demand for TELPAK service is consistent only with large concentrations of population and economic activity, so that its routes will coincide with

large volume routes of AT&T's MTT service. The result is that the average TELPAK circuit is able to realize a lower unit cost than the average MTT circuit of the same length, because it will be able to utilize the high capacity, more efficient facilities. To fail to accord these lower unit costs to TELPAK seriously impairs the correct costing analysis for this class of service.

G. No Reasons or Facts Are Given Upon Which
the Carrier Relies in Justification for
Its Determination of Net Investment Level
for Depreciation

40. Having overstated accrued depreciation in its full additional cost study in 1967, AT&T has now overcompensated by its understatement of accrued depreciation in its LRIC study submitted to support the proposed further rate increases. Thus, AT&T has now used only the depreciation which would accrue during a five-year planning period rather than any expression of the long-term average depreciation accrual of the incremental property involved. Return on investment is not a cash expenditure equal to some fixed percentage of net investment, but is based on the economic concept that every dollar of investment must generate sufficient earnings to meet the cost of capital for the duration of that capital.

41. Clearly, return on a net investment base calculated from average depreciation accruals over a five year period will properly reflect the full earnings requirement of capital facilities which depreciate completely in five years. But facilities which last twenty years will at a maximum be only a quarter depreciated at the conclusion of five years (assuming

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straight line depreciation). Return on a net investment base calculated from depreciation accruals during this short period will grossly overstate the earnings requirement imposed by these investments, since they are capable of further earnings for at least fifteen more years. Thus, the return requirement is properly measured only by a calculation which reflects the full lifetime earnings capability of the facilities involved measured against the long term average level of outstanding net investment of the facility group in question.

H. No Reasons or Facts Are Given Upon Which the Carrier Relies in Justification for the Imposition of a Burden Upon TELPAK to Subsidize Other Studies, Even Under Its Own FDC Studies

42. With respect to "burden", paragraph 8 of the agreement among the parties in Phase I-B of Docket No. 16258 provided: ^{50/}

"Historical book costs for interstate services should be analyzed for the purpose of obtaining information which may be useful in determining whether, during the test period, any service category has burdened^{1/} any other service category. Such analyses should, to the extent practicable, allocate the total test period historical costs in such a way as to estimate the costs that have been incurred for the provision of each service category. Consistent with the foregoing, the assignment or allocation of these costs to a service category should reflect consideration, as appropriate, of cost responsibility, relative use and any other factors which are pertinent to the purpose for which the analysis is being made.

^{1/} The determination of the existence of a 'burden' will depend upon the context of the particular case."

^{50/} FCC 69-842, 18 F.C.C. 2d 761, 766 (1969).

43. In conducting studies of fully distributed costs (FDC), AT&T has advocated a "cost responsibility" basis, in which the unit costs which prevailed at the time the service units were added are considered applicable to that service, regardless of the type of facility now being employed for that service. The most complete execution of this principle is found in AT&T's Method 3,^{51/} in which the line haul and telephone carrier terminal investments applicable to other than the DDD network circuits were developed by applying, to the related circuit miles, an investment per circuit determined on the basis of an estimate of the over-all average of added costs for such facilities incurred per added circuit mile during the period 1964 through 1966. Method 4 of the FDC study attempts to reflect the same kind of adjustment by a different technique, viz., by assigning the older types of plants (open wire, VF cable, and K carrier) to the service categories that existed at the time that plant was originally constructed. On that basis, TELPAK circuits included a mix of only N-carrier, coaxial cable, and radio. Taking into account the proposed rate increases, Attachment A of the FDC study indicates that the TELPAK rate of return would be 10.2 percent under Method 3 and 7.2 percent under Method 4.

44. This new filing also contains two new methods, as adjustments for Methods 3 and 4. Method 5 is essentially the same as Method 3, except that it reflects the length of haul characteristics of each of the

^{51/} "Fully Distributed Embedded Cost Study for Bell System Interstate Services -- Annualized As Of Late 1967 (Revised)", dated September 29, 1969.

various services. The impact on TELPAK is to reduce the return, since TELPAK circuits are generally shorter than the average for the system and hence have higher average costs (in this analysis, as in all other costing, AT&T fails to reflect the specific high density characteristics of TELPAK). Method 6 is a revision of Method 4, but it uses the concept of capacity costing, based on the principle that incremental costs which serve to reduce unutilized capacity in the system should be costed according to their full capacity rather than the prevailing level of utilization at the time they are introduced. Under the proposed rate schedule, Method 5 shows a rate of return of 8.9 percent and Method 6 a return of 9.0 percent. Thus, under all of the "cost-causing responsibility" methods except Method 4, the TELPAK return is higher than the return on the Bell System as a whole, authorized or actual, and significantly higher than the return on Message Toll Telephone.

45. If the adjustment applied to Method 4 is applied instead to Method 3, the disparity between the return on TELPAK and that on other services becomes even greater. If Method 3 is also adjusted to reflect the capacity cost concept as AT&T applied to Method 4, then the rate of return for TELPAK can be estimated at 11.1 percent, assuming that the impact of the Method 6 adjustment on Method 5 corresponds to the upward adjustment of Method 4 to Method 6. On their face, therefore, at a time when AT&T already receives more than its authorized rate of return, AT&T's proposed further rate increases would require TELPAK to carry more than a

fair share of AT&T's revenue requirements even on AT&T's own versions of a fully distributed cost basis, and must be rejected in the absence of some explanation why TELPAK should be so burdened.

I. No Reasons or Facts Are Given Upon Which the Carrier Relies in Justification for Its Failure to Propose Rates Which Would Yield the Greatest Revenues Under the LRIC Approach, Pointing Up the Arbitrary and Illogical Nature of the Whole Exercise

46. Even under AT&T's LRIC study, with its overstated costs, Attachment C reflects that the LRIC costs of TELPAK would be covered by adequate revenues at the present interim rates,^{52/} so that the proposed further rate increases result from charging what the traffic will bear under AT&T's market study. While revenues would be the greatest under Schedule 3,^{53/} the rates now actually proposed, AT&T's cost data also shows that its greatest profits, or net revenues, would be realized under Schedule 4, which postulates rates of \$40/\$115/\$40 rather than \$30/\$85/\$35.^{54/} The theory of the firm, however, is to maximize profits, not gross income, so that it might be anticipated, ceteris paribus, that AT&T would propose Schedule 4 as best designed to realize maximum net revenues.

47. Obviously, however, other things are not equal, and AT&T was constrained to accept a net effect of \$88.4 million rather than \$136.5 million, and forego the additional net revenues of \$48.1 million in further

^{52/} "Long-Run Incremental Cost Analyses of TELPAK, Private Line Telephone, and Private Line Telegraph Services," under the tab "Cost Data", submitted with Transmittal No. 10609, Attachment C, page 1.

^{53/} "Interstate Private Line Market Study," September, 1969, Tab 3, Table 2.

^{54/} "Long-Run Incremental Cost Analyses * * *," under the tab "Cost Data", Attachment A.

profits, because the effects on the market in shrinking their communications ^{55/} uses would have been too palpably unacceptable. In a recent address, a Vice President and Counsel of AT&T acknowledged:

"Some years ago the Bell System introduced its Telpak service which offers business customers large quantities of private line service at very low rates. The result was not only a great upward surge in the use of communications, but many major American businesses and the Federal Government itself were able through the use of Telpak to largely reorganize their methods of operation.

"I don't think we will ever know how much other businesses were able to increase their efficiency and their growth because of Telpak, but I feel sure it was substantial. Despite the fact that our Telpak service has been much criticized in numerous proceedings before the FCC, it has undoubtedly contributed significantly to the nation's economic progress in the 1960s."

AT&T's Vice President in Charge of the Long Lines Department recently testified in the closed meetings on "continuing surveillance": ^{56/}

"But the thing we have sensed in the last couple of years is really a sharp rise in not only customers' expectations, but the importance of the service to the customers, and this applies both to residence and business customers.

"However, I think it is more acute with the business customers. Not too many years ago, communications services were an important adjunct to a man's business, something that he felt important to his operations. But today there are a substantial number of businesses where communications are the very life of the business and are very vital. They have tailored their operations around the availability of good communications."

^{55/} Garlinghouse, "Regulation Needs to Change Its Emphasis," talk before the Iowa State University Conference on Public Utility Valuation and the Rate Making Process, Ames, Iowa, April 24, 1969. (Emphasis added)

^{56/} Testimony of Mr. Richard R. Hough, reported in Telecommunications, September 29, 1969. (Emphasis added)

48. The Commission is charged under statute^{57/} to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges^{57/}. Nowhere in its filing does the carrier suggest why the Commission should countenance substantially higher further rate increases which would drive users to reduce the telephone channel miles in use by 6.1 million miles (from 44.3 to 38.2 million telephone channel miles in use) below those projected at the original rates, and nowhere does AT&T suggest any standards or guidelines why the reduction of 6.1 million telephone channel miles should be sufferable, while implicitly recognizing that a reduction of 20.0 million miles (from 44.3 to 24.3) would be utterly unacceptable.^{58/} With the growing interdependence of the nation's economy upon communications, the Commission must forthrightly reject, as in violation of the Commission's mandate, proposed further rate increases which would reverse that trend, and would impair the contributions communications must continue to make to the nation's progress.

VII. The Market Studies Do Not Comply with the Agreement on Ratemaking Principles, to Produce Rate Proposals Based on Meaningful Studies, Because Their Parameters Restrict the Results to Foreordained Conclusions.

A. Where the Results Produced By Purported Intensively Refined Studies Are Identical to Intuitive Previous Forecasts Based on Admittedly Inadequate Studies, the Identity of Results Must Be More Than Fortuitous

49. The mind boggles to comprehend the mathematical probabilities under the laws of chance that the identical results could be achieved by

^{57/} 47 U.S.C. § 151.

^{58/} "Interstate Private Line Study," September, 1969, Tab 3, Table 1.

two studies, one based on inchoate principles and on procedures admittedly inadequate and imperfect, the other purporting to represent sophisticated analysis, and the latest refinements of techniques and revised concepts, projecting a different time period in a dynamic industry. The dictionary tells us a parameter is "a variable or an arbitrary constant appearing in a mathematical expression, each value of which restricts or determines the specific form of the expression." Obviously, the more narrow the parameters, the more closely circumscribed the expression which results. Parameters have here been selected for a study which impose severe strictures upon the development of assumptions, techniques, and areas of inquiry, in such critical factors as the selection of the rigid, simplistic alternative schedules tested, the prejudgment in determining the level where a competitive alternative becomes available, and the restrictions on results to in-house evaluations of in-house judgments. The coincidence of results which has emerged under this process must be considered thoroughly suspect.

B. The Page Commentary Upon the ARINC Microwave Study Was At Best an Inadequate Study Misapplied
for the Purpose of Testing Competitive Necessity

50. One of the most significant factors in the development of the market studies was the rate level at which the airlines would turn to private microwave as a competitive alternative, since the airlines are the largest single user of TELPAK after the Government, and since the airlines have proffered the most comprehensive study of the private microwave system which could be built in substitute for present TELPAK configurations.

The ARINC microwave study was presented into evidence and subjected to cross-examination in the AT&T General Rate Investigation, Docket No. 16258, and (with severe limitations upon the purposes for which it was accepted) in the TELPAC Sharing Case, Docket No. 17457. The study revealed that a private microwave system for the airlines to meet their growing communications needs could be constructed and operated at costs substantially less than under the original TELPAK rate schedule, and at about one-fourth the costs of common carrier communications under the further rate increases which have now been proposed.

51. Subsequently, AT&T commissioned Page Communications Engineers, Inc., to study the ARINC proposal and prepare a review thereof.^{59/} It is this "critique" by Page which has been the principal basis used by AT&T to develop the criteria for making its TELPAK market studies for the airlines as well as for other industries. The results of the market study were, therefore, necessarily preconditioned, because those making the study were directed to assume conclusively that the airlines would sustain their use of TELPAK without diversion to private microwave at the further rate increases now proposed, reflected in Schedule 3, of \$30/\$85/\$35, but that the airlines would shift completely to private microwave, at Schedule 4 rates of \$40/\$115/\$40, with a resulting shift from 5.7 million to zero telephone channel miles in use.^{60/}

52. Even making allowances for the "gold-plated Cadillac" character of the system projected by Page, there are a number of aspects of the Page

^{59/} "Interstate Private Line Market Study," September, 1969, Tab 7, page 1.

^{60/} "Interstate Private Line Market Study," September, 1969, Tab 3, Table 3.

study in controversy which it is believed greatly inflate the anticipated cost of the system. In any event, whatever the merits of the disputes on the validity of the Page study uncritically accepted by AT&T, the Page analysis could not appropriately be used for the purpose for which it was applied, to determine the point or points at which the airlines and other large users would shift to private microwave: (a) First, because the scope of the Page project was to "examine all of the presently available material in this case (Docket No. 16258) and make an evaluation of the Radio Science Company study (for ARINC) for completeness, methods, accuracy, and adequacy based on requirements used in the study," not to determine what it would cost if Page were to build a system using its considered engineering judgment; and (b) Second, because AT&T did not even consult with Page to determine whether the Page critique could be appropriately used in this application, and what modifications or caveats might be required if it were to be so used. Thus, one of the essential criteria utilized for the market study was developed on the basis of a study limited in nature, made for another purpose, and not designed for the application which it has received.

C. The Failure to Consult Customers Concerning Their Intentions and Responses Under Varying Conditions, the Heart of the Survey, Was a Fatal Basic Defect

53. In the preparation of the market study by AT&T evaluating customer responses to several test schedules of proposed rates, AT&T solicited the views of its own "in-house" account managers serving a sample number of customers. After a one-day training meeting the AT&T account managers

prepared various reports, which were then reviewed by AT&T in-house "Industry Specialists", and then by the "in-house" AT&T Long Lines General Marketing Manager and members of the AT&T market studies staff.^{61/}

54. Not a single customer was consulted concerning what he thinks are his plans, intentions, options, and reactions. The market studies thus have a natural built-in bias because constructed on a single point of view, with a single economic interest and purpose. Furthermore, the reports of the account managers were never disclosed to the customers, including the airline parties, so that they have never been afforded the opportunity to test the accuracy and completeness of what someone else, AT&T's employees, think they think.

55. However competent the AT&T account managers, the study necessarily suffers from their limited exposure to only a limited phase of the airlines' decision-making process, and hence their limited knowledge of the components of the decisions which they are called upon to anticipate. One consideration is the state of the budget, the availability of funds to meet increased costs; AT&T's account manager, like his counterpart the airline's communications manager, can have only a limited and imperfect knowledge of this factor, which necessarily involves higher management decision. Another consideration is the relative elasticity of demand, the different volumes of communications which would be purchased at different levels; this is not only a judgment for the airline's communications

^{61/} "Interstate Private Line Market Study," September, 1969, Tab 6.

department, but also one for operations, since it involves the extent to which the airline can "make do" or "do without" communications if costs rise, or conversely, the extent to which communications uses can expand if rates are lowered. A third consideration is the anticipated growth in the use of communications; just as industry tends increasingly to rely upon communications, so communications tend to rely increasingly upon industry, and it is basically the judgment of business forecast by economic specialists, not communications forecasts by communications specialists, which will determine the future growth in communications in a particular industry. Finally, a fourth consideration is the level at which the industry would move to private microwave; it is submitted that AT&T personnel can have only the foggiest notion of the factors, including the costs of a private system, which determine this judgment. A basic deficiency in the market study, therefore, was the failure to consult the parties most informed, the customers themselves, on matters involving not only a communications judgment but a composite of a series of industry judgments.

D. The Failure to Consider Ranges of Varying Rates
Was a Fatal Defect for Even a Minimal Study of
Practical Applicability

56. One of the most curious aspects of the AT&T market study is the limitation of the study to four blocks of schedules, varying the components of each block in only one case (by changing the telegraph/telephone

equivalency at present interim rates).^{62/} Economists recognize that elasticities of demand are not a linear function, and that they are always relative to particular areas of price changes. In light of the substantial sums involved, the numerous permutations and combinations possible, the broad economic effects of changes upon the entire nation's business, and the sensitivity and cost consciousness of AT&T's customers in the present state of the nation's economy, a bludgeon is hardly the appropriate instrument for the fine tuning required to set appropriate rates. Despite the volume of papers, what the studies purport to measure are so unrefined, limited to four discrete schedules, that it is submitted that the Commission is prevented from making an informed judgment on the basis of the data submitted of the propriety of the particular rates.

E. The Failure to Consider Variations Without TELPAK Sharing and With Unlimited TELPAK Sharing Is Another Unexplained Deficiency

57. Another badge of the artificial character of the market survey is the failure to give any consideration to the existence of a recommended decision by the Chief of the Common Carrier Bureau in the TELPAK Sharing Case, Docket No. 17457, proposing either the elimination of the present TELPAK sharing provisions or, alternatively, the unlimited extension of sharing. The testimony of AT&T witnesses in that case emphasizes the large impact

^{62/} "TELPAK Rate Adjustments", page 4, in material accompanying Transmittal No. 10609.

either of these alternatives would have on AT&T costs and markets. Whatever the views of the carrier or of others on the lack of merit in either alternative, and however justified those views may be, it must be concluded that elementary prudence would have dictated that some consideration be given to alternative possible changes thus "overhanging the market" under study the eventuality of either of which would have mooted all the other market and cost studies.

VIII. Suspension with an Accounting Would
Be a Completely Inadequate Remedy

58. The present interim TELPAK rate increases are already under an accounting order,^{63/} after the expiration of the full period of suspension of 90 days ordered by the Commission^{64/} as provided under Section 204 of the Communications Act of 1934, as amended.^{65/} An accounting, however, provides grossly insufficient protection not only to the users but to the general public where the charges are so substantial as those now proposed, and particularly where they are pyramided upon already outstanding substantial increases whose validity has not yet been adjudicated. Users such as the airlines, which are already operating under a most serious "profit squeeze" providing an inadequate rate of return (currently 4.7%) are constrained now to come up with the funds to pay the increased charges to a carrier whose return is already swollen beyond that authorized by the Commission. Whatever the ultimate results anticipated in a hearing, the users must make provision

^{63/} FCC 68-711, 13 F.C.C. 2d 853 (1968).

^{64/} FCC 68-388, 33 Fed. Reg. 5900 (1968).

^{65/} 47 U.S.C. § 204.

in their budgets now, and build their accounting system now, with adequate allowance for the charges imposed. If the rate increases are passed on to the myriads of airline passengers, it would be an impossible undertaking to attempt to identify the millions of proper recipients of a refund; if it is not passed on, then the industries such as the airlines, themselves certificated to serve the public interest, convenience, and necessity, must suffer an additional burden upon their inability to earn an appropriate authorized rate of return necessary to discharge their responsibilities under their certificates.

59. In view of the magnitude of the issues and sums here involved, certainly a substantial period of time beyond the usual suspension period would be required before the hearing could be resolved. Therefore, even under an accounting the financial projections of the users would be distorted for an unconscionable period of time during which there has not even been a determination under the prior accounting order.

60. It is now well settled judicially that the opportunity for refund under an accounting is an inadequate, unsatisfactory, and generally illusory protection, and in no way an effective substitute for postponement or withdrawal of proposed rates. In upholding the entry of an order by the Federal Power Commission which directed an interim reduction and refund, the Supreme Court said in the leading case of FPC v. Tennessee Gas Transmission Co.:^{66/}

^{66/} 371 U. S. 145, 154-55 (1962).

"To do otherwise would have permitted Tennessee Gas to collect the illegal rate for an additional 18 months at a cost of over \$16,500,000 to consumers. True, the exaction would have been subject to refund, but experience has shown this to be somewhat illusory in view of the trickling down process necessary to be followed, the incidental cost of which is often borne by the consumer, and in view of the transient nature of our society which often prevents refunds from reaching those to whom they are due. It is, therefore, the duty of the Commission to look at 'the backdrop of the practical consequences [resulting]. . . and the purposes of the Act,' * * *. [T]he Commission's ultimate action in directing the severance and in entering the interim order was not only entirely appropriate but in the best tradition of effective administrative practice."

67/

These views were reaffirmed in FPC v. Hunt,^{67/} where the Supreme Court said: "Nor is it any answer to say that the suspension power * * * will afford protection to the public. * * * As we said * * *, the possibility of refund does not afford sufficient protection * * *." The Federal Power Commission in its Annual Report to Congress in 1953 likewise described the procedure of collecting the "higher rates under bond" as "unsatisfactory, burdensome, and present(ing) many difficult problems for the company as well as for the distribution utilities which must pay the higher rates." There should be no illusion, therefore, that suspension with an accounting is a satisfactory substitute for rejection, or that the protection afforded can make the users or the public whole.

^{67/} 376 U.S. 515, 524 (1964). Cf. United Gas Improvement Co. v. Gallery Properties, Inc., 382 U.S. 223, 228 (1965); City of Chicago v. FPC, 385 F. 2d 629, 644 (U.S. App. D. C. 1967), cert. den. 390 U. S. 945 (1968).

IX. The Commission Has Plenary Power and the Affirmative Responsibility, Under All the Circumstances, to Reject the Proposed Further Rate Increases

61. The plenary power of a Federal agency to prohibit the pyramiding of rate increases, despite statutory limitations on suspension, is well established. In upholding the authority of the Federal Power Commission to impose a moratorium on proposed rate increases, the Supreme Court said in the Permian Basin Area Rate Cases:^{68/}

"Certain of the producers * * * reason that § 4(d) creates an unrestricted right to file rate changes, and that such changes may, under § 4(e), be suspended for a period no longer than five months. If this construction were accepted, it would follow that area proceedings would terminate in rate limitations that could be disregarded by producers five months after their promulgation. * * *

"* * * [T]his Court has already declined to find in § 4(d) or § 4(e) an 'invincible right to raise prices subject only to a six month delay and refund liability.'" (Emphasis added)

^{69/}
In FPC v. Texaco, Inc., the Supreme Court recognized that an administrative agency, despite suspension limitations, may cut off successive rate increases at the threshold:

"It must be remembered that under this Act rate increases are initiated by the natural gas company, the Commission having the burden by reason of § 4(e) of the Act to initiate a hearing on their legality with only a limited power to suspend new rates.* * * Natural gas companies that seek to enter the field with prearranged escalator clauses and the like have a built-in device for ready manipulation of rates upward. Protection of the consumer interests against that device may best be achieved if it is given at the very threshold of the enterprise. At least the Commission may so conclude * * * *

^{68/} 390 U.S. 747, 779 (1968).

^{69/} 377 U.S. 33, 42-44 (1964).

"To require the Commission to proceed only on a case-by-case basis would require it, so long as its policy outlawed indefinite price-changing provisions, to repeat in hearing after hearing its conclusions that condemn all of them. There would be a vast proliferation of hearings * * * *. We see no reason why under this statutory scheme the processes of regulation need be so prolonged and so crippled."

62. The power of the agency to impose a moratorium was "unquestionably set at rest"^{70/} in United Gas Improvement Co. v. Gallery Properties, Inc.,^{71/} where the Supreme Court upheld the "ample power" of the Commission to keep the price level relatively constant pending determination of the just and reasonable rate for consumer protection during the interim period. Congress, the Supreme Court said in FPC v. Hunt,^{72/} could not have intended "any such incongruous result" as to permit the Commission's power to review rates to be nullified by subsequent independent action by the regulated entity filing new rates. The Court there repeated and reaffirmed the language of Atlantic Refining Co. v. Public Service Comm'n,^{73/} in response to a claim that the vitality of the suspension provisions was being impaired:

"This is not an encroachment upon the initial rate-making privileges allowed natural gas companies under the Act, * * * but merely the exercise of that duty imposed on the Commission to protect the public interest in determining whether the issuance of the certificate is required by the public convenience and necessity * * *. [I]t so conditions the certificate that the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act."

^{70/} Continental Oil Co. v. FPC, 373 F. 2d 510, 527 (5th Cir. 1967), cert. den. 491 U. S. 917 (1968).

^{71/} 382 U.S. 223, 228 (1965).

^{72/} 376 U. S. 515, 522, 523-24 (1964).

^{73/} 360 U.S. 378, 391-92 (1959).

63. In the recent Ingot Molds Case,^{74/} the Supreme Court upheld the authority of another agency, the Interstate Commerce Commission, to hold the line on existing rates while it was considering, as here, general ratemaking principles:

"We have already observed that the ICC has presently pending before it a broad-scale examination of the whole question of the cost standards to be used where comparisons of intermodal cost advantages are required. * * *"

"This Court has just recently held that the Federal Power Commission had the authority to fix rates on an area-wide basis rather than on an individual producer basis and that, in order to make such a procedure feasible, it had statutory authority to impose a moratorium upon rate increases by procedures for a period of 2-1/2 years after the setting of the area rate. * * * The basis for this holding was the principle that the 'legislative discretion implied in the rate making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself.' * * * That principle is equally applicable to rate regulation carried out by the ICC * * * ." (Emphasis added)

64. In recent cases the Courts have also emphasized the broad regulatory powers of this Commission in the context of CATV regulation to effectuate its statutory responsibilities, and to provide interim relief pending hearing determinations. In United States v. Southwestern Cable Co.,^{75/} the Supreme Court quoted from the Permian Basis Area Rate Cases, supra, "We have elsewhere held that we may not, 'in the absence of compelling evidence that such was Congress' intention . . . prohibit administrative action imperative for the achievement of an agency's ultimate purposes'", and further declared:

^{74/} American Commercial Lines, Inc. v. Louisville & N.R.R.Co., 392 U.S. 571, 590, 592 (1968).

^{75/} 392 U. S. 157, 177, 180-81(1968).

"The Commission has acknowledged that, in the area of rapid and significant change, there may be situations in which its generalized regulations are inadequate, and special or additional forms of relief are imperative. It has found that the present case may prove to be such a situation, and that the public interest demands 'interim relief . . . limiting further expansion', pending hearings to determine appropriate Commission action. Such orders do not exceed the Commission's authority. * * * Thus, the Commission has been explicitly authorized to issue 'such orders, not inconsistent with this [Act], as may be necessary in the execution of its functions'. 47 U.S.C. § 154(i). See also 47 U.S.C. § 303(r). In these circumstances, we hold that the Commission's order limiting further expansion of respondents' service pending appropriate hearings did not exceed or abuse its authority under the Communications Act."

In General Telephone Co. of California v. FCC,^{76/} the United States Court of Appeals for the District of Columbia further extended the implicit regulatory authority of the Commission in aid of its explicit powers, rejecting an argument that the provision for one method of enforcement was exclusive and precluded the availability of other remedies to the Commission: "The contention that Section 312(b)'s enforcement techniques are restricted in applicability to those parties particularly subject to the general regulatory provisions of Title III also runs contrary to the reasoning of recent decisions emphasizing the flexibility which an expert regulatory agency must possess if it is to keep pace with a still burgeoning industry."

65. In broadcast matters, the Commission has not hesitated^{77/} to impose a "freeze" on broadcast license applications without express statutory provisions, pending determination of general proceedings relating to the

^{76/} F.2d , 16 R.R. 2d 2001, 2018 (U.S. App. D.C. 1969).

^{77/} Interim Criteria to Govern Acceptance of Standard Broadcast Applications, 23 R.R. 1545 (1962), 24 R.R. 1540 (1962); Kessler v. FCC, 326 F.2d 673, 681 (U.S. App. D.C. 1963); Harvey Radio Laboratories, Inc. v. United States, 289 F. 2d 458, 460 (U.S. App. D.C. 1961); Harbenito Broadcasting Co. v. FCC, 218 F. 2d 28 (1954); Vindicator Printing Co., 8 R.R. 328 (1952); cf. American Broadcasting Co. v. FCC, 191 F.2d 492 (1951).

allocation of frequencies or the assignment of channels, despite the direction of Section 309 of the Communications Act ^{78/} that it either "shall grant" an application or "shall formally designate the application for hearing."

66. The imposition of further rate increases during the pendency of a hearing on prior rate increases seriously prejudices orderly and efficient regulatory procedure and the rights of the parties to the present litigation. As the Ashbacker ^{79/} case recognized in another context, the Communications Act is not to be construed in such a way as to require or permit a procedure which frustrates proper and orderly regulatory processes: what "may satisfy the strict letter of the law" may not satisfy "its spirit or intent. * * * Legal theory is one thing. But the practicalities are different." As a practical matter, when rates are permitted to be pyramided obviously the propriety of the lesser rates tends to be obscured in the litigation. It is submitted that the proposed further rate increases are so defective in concept, development, timeliness, and justification, that no other remedy but rejection or withdrawal is adequate under all the circumstances.

X. If Confidence in the Integrity of the Administrative Process Before the Commission Is To Be Preserved, Prejudgment of Basic Underlying Questions Here Involved Predicated on Predilection Upon Predilection Must Be Avoided

67. There is no conceivable legal basis for permitting the second half of a Telpak rate increase of over 100% to become effective, even under

^{78/} 47 U.S.C. § 309. (Emphasis added)

^{79/} Ashbacker Radio Co. v. FCC, 326 U.S. 327, 332 (1945).

a second accounting order, without any determination of any of the basic questions underlying the two prior levels of rates, which questions have not been fully heard, much less determined, through no fault of the users complaining of such pyramiding increases. The only conceivable explanation, as distinguished from legal basis or justification, apparently lies only in possible prejudice predicated on predilection upon predilection.

68. To be more specific, the first predilection here involved is bound to stem from the results of the 7 Way Cost Study in the Telegraph Service investigation, or of the Broad Brush Updating thereof in Docket 16258, or of the 9 Way Cost Study in Docket 16258, or of the combination of the three. The point here is that no one of these past and now out of date studies has ever been tested by cross-examination, briefing or oral argument, much less has there ever been an adjudication of the validity of any of the results of any of such studies, to support the first predilection, that the rate level of any particular class of service (including Telpak specifically) is non-compensatory and is thus casting a burden on other classes of service.

69. The second predilection here involved which, for obvious reasons has been carefully nurtured by AT&T, stems from the mistaken notion that in order to be "for" lower message toll and WATS rates to the general public, you have to be "against" low rates for such bulk communications service as

Telpak for such large users as the Government, the airlines, the railroads, the truckers, the bus operators, and the like. This is a complete non sequitur, as demonstrated by the consensus of the eminent experts in Phase I-B of Docket 16258, which has been concluded, with the Commission's approval, without any determination of this threshold rate level relationship question.

70. On these two predilections "hang all the law and the prophets" for possibly prejudging the propriety of permitting AT&T to extract, even under a second accounting, the third level of Telpak rates without any completed hearing or adjudication of any of the underlying undetermined questions with respect to the two prior levels of Telpak rates.

71. The legal basis for any such action can hardly be found in the concurrently effective "trade" which AT&T has the effrontery to offer the Commission in its special transmittal of October 1, 1969, namely, 87 million dollars of message toll and WATS rate reductions for 87 million dollars of rate increases in Telpak, network and TWX services. How "nice" that would be for AT&T, in the light of pending surveillance proceedings, disclosing 167 million dollars of revenues annually in excess of the top of the range of rate of return heretofore allowed by the Commission!

72. Before the Commission seriously considers any such ill-advised course as permitting this unconscionable pyramiding of rate increases, in the light of the posture of incomplete proceedings and undetermined basic questions, we respectfully suggest that it ask itself this question:

Do we have any real basis for doing so other than the predilections noted above?

XI. Conclusion

WHEREFORE, THE PREMISES CONSIDERED, The Airline Industry Parties respectfully petition that the Commission reject, or require or secure the withdrawal of, the further rate increases proposed in TELPAK (Series 5000) service, Tariff F.C.C. No. 260, under Transmittal No.10609, dated October 1, 1969, by the American Telephone and Telegraph Company, Long Lines Department.

Respectfully submitted,

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There Has Never Been a Determination of the Underlying Issues on the Original TELPAK C and D Rates, the Interim Rate Increases, or the Various Allegedly Supporting Cost Studies, All of Which Must Be Resolved Before Any Further Successive Rate Increases, Interim or Otherwise, Can be Imposed

March 18, 1964

In the tentative decision in the original TELPAK Case, Docket No. 14251, the Commission found that there "is apparent justification for TELPAK C and D classifications in terms of meeting competition from private microwave systems having channel capacities comparable to those offered by such TELPAK classifications," but was "unable to determine on this record that the rates for TELPAK C and D classifications are compensatory in relation to the cost of furnishing the services offered thereunder." 38 F.C.C. 370, 395.

Dec. 24, 1964

In the final decision, the Commission affirmed its tentative decision, and ordered that the record be reopened to consider "whether or not the existing rates for TELPAK C and D are compensatory" on the basis of additional data from cost studies being conducted by AT&T of its various services. 37 F.C.C. 1111, 1117-18.

Sept. 10, 1965

AT&T presented in the record in the Domestic Telegraph Investigation, Docket No. 14650, the results of a Seven-Way Cost Study, setting forth for the 12 months ending August, 1964, based on a fully-allocated cost procedure disputed in principle and in methodology, the investment, expenses, and revenues associated with each of seven different classes of communications service comprising Bell's total interstate operations, together with AT&T's expressed reservations and limitations. The material was dumped into the record as an AT&T response to a staff request, without being tested by cross-examination.

- Oct. 27, 1965 In large part, as a result of the Seven-Way Cost Study, the Commission instituted the AT&T General Rate Investigation, Docket No. 16258, to determine AT&T's revenue requirements (including rate of return) and whether AT&T's charges for its various classes of service are just and reasonable. FCC 65-959, 2 F.C.C. 2d 871.
- Dec. 22, 1965 The AT&T General Rate Investigation was divided into two phases. Phase I was to consider respondents' total interstate revenue requirements, and the relevant rate-making principles to control in the distribution of revenue requirements among the various classes of service. FCC 65-1143, 2 F.C.C.2d 142.
- April 7, 1966 A letter from the FCC Staff's Managing Counsel in Docket No. 16258 to AT&T's counsel reduced to writing their understanding that AT&T would make witnesses available to describe the procedures and methods of the Seven-Way Cost Study, and would prepare a revised version to give a "broad-brush" updating to reflect 1965 operating results.
- April 29, 1966 The Commission's Telephone and Telegraph Committees issued their report in the Domestic Telegraph Investigation, Docket No. 14650, summarizing the results of the Seven-Way Cost Study at pp. 200-04, without the Study's validity or applicability, if any, to particular rates or rate levels having been tested or subjected to cross-examination in the proceeding, and without any adjudication of the underlying questions which in the meanwhile had been put in issue in Docket No. 16258.
- July 28, 1966 The Seven-Way Cost Study was dumped into the record in the AT&T General Rate Investigation, Docket No. 16258, by renumbering AT&T's Exhibits 81-88 in Docket No. 14650 as FCC Staff Exhibits 1-8 in Docket No. 16258, without an opportunity for cross-examination or rebuttal.

Sept. 15, 1966

In American Trucking Associations v. FCC, 377 F.2d 121, cert. den. 386 U.S. 943, the United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's decision in the TELPAC Case, and noted that the compensatory issue had been remanded for further hearing because the Commission's conclusion "that Telpak C and D rates were justified by competition * * * necessitated a determination as to whether these rates were compensatory, that is, whether they would bear their own costs or would be a burden on other customers of the Company."

Nov. 9, 1966

The Commission ordered that the TELPAC Case be terminated after TELPAK A and B were deleted, incorporated the TELPAK record into Docket No. 16258, and folded the undetermined, remanded compensatory issue into Docket No. 16258. FCC 66-1005, 7 F.C.C.2d 30.

Nov. 17, 1966

A "Broad-Brush Updating of Seven-Way Cost Study for the Year 1965" was distributed to the parties. It was dumped into the record of Docket No. 16258 as FCC Staff Exhibit 37 on Nov. 16, 1967, Tr.Vol.92, p. 12615, without an opportunity for cross-examination or rebuttal.

Dec. 7, 1966

The Commission ordered in Docket No. 16258 that Phase 1 on revenue requirements and rate of return, but without rate-making principles and factors, was to be decided before further proceedings. FCC 66-1136, 5 F.C.C.2d 844.

Dec. 21, 1966

On petitions for reconsideration of its order terminating the TELPAC Case, the Commission stated, FCC 66-1188, 6 F.C.C. 2d 177:

"The Commission, in amending its Order of October 27, 1965, in Docket No. 16258 (FCC 65-959) to include a consideration of TELPAK's C and D within that docket, was mindful of the fact that the only remaining issue with respect to TELPAC C and D was whether the existing rates

Dec. 21, 1966
(cont.)

were compensatory. This issue deals with the over-all level of earnings for the service and does not relate to a detailed analysis of the specific rates involved. Accordingly, since Docket No. 16258 contains within it the issues of the proper rate of return and the relationships of the level of earnings of the different classes of service, it is the proper proceeding within which to determine the compensatory nature of TELPAK C and D and their relationship to the other services." The Commission denied petitions by the airline parties and others that the compensatory issue be resolved in Docket No. 14251.

Jan. 9, 1967

AT&T "filed" and distributed in Docket No. 16258 (but did not file as a tariff schedule) rate proposals for TELPAK C and D rate increases to \$30 for TELPAK C base capacity per airline mile, \$85 for TELPAK D base capacity per airline mile, \$35 for the first terminal, \$15 each additional terminal, and a 2 to 1 telegraph/telephone equivalency. Very summary revised cost data were also filed.

Jan. 9, 1967

Separately, under Transmittal No. 10001, AT&T filed revised tariff schedules to eliminate TELPAK A and B, change some private line telephone and telegraph rates, and introduce Series 8000. At the request of the Commission, the effective date of the changes was postponed from May 1 to August 1, 1967.

Jan. 18, 1967

Letter from Chairman Hyde to AT&T counsel, requesting AT&T's intentions to submit a "sum of the parts" cost study as of "utmost importance" to permit the Commission on the basis of record data to evaluate the reasonableness of AT&T's rate structure.

Feb. 20, 1967

Letter from AT&T counsel to Chairman Hyde emphasizing its position that a "sum of the parts" allocation of total costs is inappropriate as a method of determining the levels of rates properly chargeable for the various classes of service.

Mar. 2, 1967

Letter from Chairman Hyde to AT&T counsel, that "regardless of what costing or rate making principles are advanced in this proceeding either by Respondents or any other party, adequate information on a fully distributed cost basis should also be available to aid in our consideration of the other principles involved. We wish to make it clear, therefore, that the Telephone Committee deems it essential that fully allocated costs apportioned among all services be supplied by you in order that the Commission may be able to give proper consideration to such other cost principles as you may advocate. * * * [F]ailure to provide such a study may well make difficult, if not impossible, implementation of your proposals should it be determined that the cost principles you advocate are the appropriate methods for determining rates and charges for the services you furnish.

"* * * [Y]ou are directed to prepare a new study similar to the 'seven-way cost study' for introduction into this proceeding * * * [and] to make any further improvements or refinements you deem appropriate to enhance the accuracy of the updated study.

"* * * We wish to put you on notice that we will expect a complete study covering each of your services to which you propose to apply such costing procedures [other than on a fully allocated basis]* * * *."

July 5, 1967

Commission released its interim decision and order in Phase I-A of Docket No. 16258 approving a rate of return for AT&T's interstate services in the 7 to 7.5% range, and finding that AT&T was earning a rate of return of 8.56% at the existing overall level of its interstate rates, with adjustments, requiring a reduction of \$120 million in interstate revenues to bring the level of interstate earnings appropriately within the range of reasonableness specified. FCC 67-776, 9 F.C.C.2d 30, 88, 114-16.

Sept. 14, 1967

On reconsideration, the Commission modified its interim decision on Phase I-A of Docket 16258, but reaffirmed its findings on a 7 to 7.5% rate of return, and a rate reduction requirement of \$120 million. FCC 67-1047, 9 F.C.C. 2d 960.

Sept. 25, 1967

AT&T advised the Commission it would shortly file new tariffs designed to reduce interstate revenues by \$100 million in compliance with the Commission's orders. FCC Report No. 2616.

Jan. 23, 1967

In acting on a petition for clarification of issues in Docket No. 16258, the Telephone Committee stated with respect to the proposed TELPAK C and D and other proposed rate increases, FCC 68M-130:

"While we did not originally contemplate consideration of any specific rates in this proceeding, intervening events have modified the situation. Thus, Respondents have offered evidence herein on a broad economic theory of pricing, together with a practical translation of that theory into detailed cost and market studies. Those studies, in turn, are tied to certain rate changes deemed by Respondents to be necessary in the light of their examination of rate-making principles. Any meaningful consideration of the rate-making principles here in issue thus requires consideration of the price changes as well as the extensive cost and marketing data offered by Respondents. Petitioners and others affected therefore have an interest in the proposed rate changes and should be provided reasonable opportunity to cross-examine with respect to these rates and to offer direct testimony with respect thereto."

March 14, 1968

Following off-the-record conferences to provide the parties an opportunity to determine whether areas of agreement existed on rate-making principles, the Hearing Examiner reported that "it was the general consensus that we were unable

March 14, 1968
(cont.)

to agree on any matters of sufficient significance to record, or to contribute meaningfully to a resolution of this proceeding, and that the appropriate medium for achieving that end would be to resume the record presentation of evidence." FCC 68M-447.

March 27, 1968

The Commission deferred the filing of an AT&T tariff for 90 days to effect another rate reduction of \$20 million. The dissenting opinion noted that AT&T had earned about 8% in 1967 and during the first month of 1968. FCC 68-341, 12 F.C.C.2d 167.

April 10, 1968

The Commission suspended for the statutory period of 3 months to September 1, 1968, TELPAK interim rate increases (TELPAK C, from \$25 to \$28; TELPAK D, from \$45 to \$60; terminals, first from \$15 to \$25, subsequent from \$5 to \$10; equivalency from 12:1 to 6:1), and instituted a hearing in a new Docket No. 18128. The Commission noted that the question as to whether the original TELPAK C and D rates were compensatory had been placed at issue in Docket No. 16258, and stated, FCC 68-388, 33 Fed. Reg. 5900:

"The Commission is cognizant of the fact that the record in Docket No. 16258 is not complete as regards TELPAK C and D, since A.T.&T.'s evidence has not yet been fully examined, and the users of service under the TELPAK tariff, a number of whom are parties intervenor to the proceeding, have not yet had the opportunity to put on their cases in opposition. Presumably, such intervenors will seek to establish that the present rates are in fact compensatory, and that competitive necessity requires their maintenance at the present level. Moreover, we are cognizant of our conclusion in the original TELPAK case that the TELPAK C and D rates were apparently justified by competitive necessity, provided, however, that they be shown to be compensatory."

April 10, 1968
(cont.)

"On the basis of the foregoing, and the information now before us, we are unable to determine that the charges, classifications, regulations and practices contained in the revised schedules are or will be just and reasonable or otherwise lawful. If the revised schedules are permitted to become effective, the rights and interests of the public may be adversely affected thereby."

"[I]t should clearly be understood by the TELPAK users, that, in the event a hearing record indicates that increases in the level of TELPAK rates are justified or required, or that the TELPAK classification should be eliminated, any increases occasioned thereby will become effective without delay."

May 20, 1968

AT&T's 'Fully Allocated Embedded Cost Study for Bell System Interstate Services--Annualized as of Late 1967' marked for identification in Docket No. 16258 as FCC Staff Exhibit No. 48 for identification without being received in evidence or tested by cross-examination (so-called Nine-Way, X-Way, or 36-Way Cost Study).

June 26, 1968

The Commission implemented its previous order for reduction of the remaining \$20 million rate reduction. The Commission noted that AT&T has continued to enjoy earnings "well in excess of 8% on interstate operations, and that the rate of growth that has been continuing in interstate services had been sufficient to offset in large measure the effect of rate reductions as well as increased interstate revenue requirements." FCC Report No. 2935. FCC 68-667, 13 F.C.C. 2d 716.

July 10, 1968

In denying petitions for consolidation of Docket No. 18128 (TELPAC interim increases) with Docket Nos. 16258 (AT&T General Rate Investigation) and 17457 (TELPAC Sharing Case), but ordering an accounting

July 10, 1968
(cont.)

on the TELPAK interim increases, the Commission stated, 68-711, 13 F.C.C. 2d 853 (footnote omitted):

"It is our expectation that upon completion of the record in Phase I-B in these respects, the Commission will be in a position to prescribe appropriate principles or guidelines for the determination of the over-all revenue objectives that are to be met by Respondents in the design of each of their principal rate classifications. It is also our intention to determine the extent to which each of the existing or proposed rate classifications accord with, or fall short of, meeting those principles and guidelines."

"Thus, with respect to Respondents' rates for TELPAK service, including those now under suspension and investigation in Docket No. 18128, we will determine in Phase I-B of Docket No. 16258 whether competitive or other valid considerations justify the pricing discrimination existing in the TELPAK offering; and, if so, whether Respondents' existing or proposed rates for TELPAK will make an appropriate contribution to Respondents' total interstate revenue requirements. These determinations with respect to the revenue objectives appropriate to TELPAK and other services are, in our opinion, of threshold essentiality to a determination of the reasonableness and lawfulness of the specific rates and rate relationships within the individual rate structures. It is also our opinion that we can arrive at these threshold determinations without simultaneously resolving all other questions."

We will, therefore, defer hearings in Docket No. 18128 concerning the internal specifics of the TELPAK rate structure until the rate principle determinations are made in Docket No. 16258 and the sharing issue is decided in Docket No. 17457."

Jan. 24, 1969

AT&T's "Description of 1964 7-Way Cost Study", "Description of the 1965 Broad-Brush Updating of the Seven-Way Cost Study", and "Description of 1967 Nine-Way Cost Study" marked for identification as FCC Exhibits 53, 54, and 55 for identification, respectively, but never received in evidence, in Docket No. 16258, and never subjected to testing by cross-examination or rebuttal evidence.

Feb. 24, 1969

The Chairman of AT&T reported that AT&T was currently earning about 8% return on its investment, and hoped to increase this to about 8-1/2%. He expected revenues to rise at least 8% during the year (the current rate of growth was about 10% annual rate), and to maintain the company's current operating profit margin at this higher volume. AT&T's revenue had climbed 111% during the past 10 years, or double the 58% in the gross national product. Wall Street Journal.

June 23, 1969

The Chairman of AT&T announced earnings of \$1.06 per average share outstanding for the three-month period ended May 31, 1969, compared with 92 cents the year before, and 97 cents in the quarter ended February 28, 1969. Telecommunications Reports.

July 29, 1969

With the exception of a recommendation that Docket No. 17457 (the TELPAK Sharing Case) be consolidated into Docket No. 18128, the Commission approved a "Statement of Ratemaking Principles and Factors in Docket No. 16258, Phase I-B" unanimously adopted by the parties participating in Phase I-B, FCC 69-842, 18 F.C.C.2d 761. The Commission stated:

"We have reviewed the statement solely for the purpose of determining whether the implementation of the suggested procedures might facilitate the determination of appropriate ratemaking principles for the interstate services of the Bell System respondents, and, hence, permit a more definite and timely disposition of

July 29, 1969
(cont.)

the issues involved in phase 1-B of this docket. Accordingly, we express no opinion on the merits of the various positions advocated on the record."

"The practical difficulties of accurately measuring incremental costs in a system as complex as the telephone industry has been recognized even by advocates of incremental costs as a floor for pricing. Criticisms, likewise, have been directed to the use of fully distributed costs for pricing purposes."

"The specific statement of principles now proposed, in our judgment, properly recognizes the relevance of both fully distributed and incremental costs in considering appropriate rate levels of specific classes of service.^{1/} We make this observation without reaching any conclusion, at this time, as to the weight, if any, that should be accorded to either or both of these factors in fixing rates for a specific service. We note, in this connection, that the statement contemplates the submission of both fully distributed and incremental cost studies, based on methodologies to be developed. It is the thrust of the statement that effective testing of the complex economic theories of costing and pricing which have been advanced in this record, and the reconciliation of opposing, or at least partially conflicting, views of expert witnesses, can best be accomplished by relating the principles advocated to specific rate proposals. Bell has agreed that implementing studies called for by the statement, and any related rate adjustments based thereon, can be filed by October 1, 1969."

^{1/} We note, of course, that each party to the agreement has reserved the right to assert the relevance of FDC, LRIC, or any other method of cost determination."

July 29, 1969
(cont.)

"It is readily apparent that the techniques or methodology for developing the data needed to test and apply long-run incremental cost principles require formulation. Implementation of the stipulation and development of such needed data will substantially benefit from the extensive testimony and cross-examination which occurred in docket 16258, and will permit us to proceed to the testing of specific rate-making principles in the light of the issues in the Telpak-Private Line case (docket 18128), the new program transmission rates, and such additional issues that may arise."

"There would also be incorporated with docket 18128, the record of docket 14251, the Telpak case which was previously incorporated herein."

Aug. 18, 1969

In direct testimony prepared for "continuing surveillance" meetings with the Commission, AT&T projected its interstate rate of return for calendar 1969 at 8.2%. Total interstate revenues of \$5 billion, a rise of 15.2%, were projected for 1969, against an over-all increase in expenses and taxes of \$4.05 billion, a rise of 14.4%, after settlement adjustments. The rate of return for the first half of 1969 was 8.3%. Of the projected revenues, there was included a \$114 million, or 20.3% boost in private line revenues. Meanwhile, network growth and technological advances have reduced the total book costs of long lines plant per circuit mile from nearly \$60 in 1950 to \$20 in 1969, with new plant today being installed at a cost of only \$12 per circuit mile. Telecommunications Reports.

Sept. 8, 1969

In its "continuing surveillance" direct testimony, AT&T updated its estimate of 1969 interstate rate of return from 8.2% to 8.1%.

Sept. 15, 1969

At the AT&T-FCC "continuing surveillance" meetings, AT&T Vice Chairman deButts indicated that no private line increases were included in projected revenues for 1969, and the relative effect if there were any Telpak increases in the fall would "appear to be quite small". AT&T Vice President Emerson forecast an increase to 8.5% quickly if the surtax were eliminated, or in 1970 or 1971 if the surtax were not considered. Common Carrier Bureau Chief Strassburg estimated on the basis of the record there would be an interstate rate of return for 1969 of 8-1/4%. At 8.1%, AT&T is receiving \$167 million in excess of the higher limit of its authorized rate of return.

Sept. 19, 1969

In a letter to Mrs. Bell Myerson Grant, Commissioner of the New York City Department of Consumer Affairs, Chairman Hyde stated that "if, as a result of these discussions, AT&T files any revised schedules providing for rate reductions (the company has stated it seeks no rate increases) for interstate telephone services, these schedules will be subject to inspection, comment or formal objection by any interested entity including your office."

TABLE I

TELPAK

Incremental Unit Costs and Total Estimated End-of-1971 Market Quantities
(Thousands of Dollars)

	<u>Line Haul</u>		Terminals	Total
	TELPAK C	TELPAK D		
<u>Originally filed rates</u>				
LRIC Costs	\$ 36,200	\$102,000	\$170,500	\$308,700
Estimated Revenues	89,000	90,800	53,900	233,700
Profit [loss]	52,800	[11,200]	[116,600]	[75,000]
 <u>Interim rates that became effective September 1, 1968</u>				
LRIC Costs	42,300	93,000	164,200	299,500
Estimated Revenues	109,500	103,400	87,900	300,800
Profit [loss]	67,200	10,400	[76,300]	1,300
 <u>Rates filed to be effective November 1, 1969</u>				
LRIC Costs	39,800	79,900	143,700	263,400
Estimated Revenues	112,500	129,500	106,600	348,600
Profit [loss]	72,700	49,600	[37,100]	85,200

Sources:

- (1) AT&T: Attachment C to "Long-Run Incremental Analysis of TELPAK Private Line Telephone and Private Line Telegraph Services".
- (2) AT&T: "Appendix to Interstate Private Line Market Study" Tab 15, worksheets 9, 33, 45, adjusted to force reconciliation with Attachment C (Source 1 above).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

C
FCC 69-1140
37286

In the Matter of)

Amendment of Part 61 of the Commission's)
Rules relating to Tariffs and Part 1 of the)
Commission's Rules relating to Evidence.)

DOCKET NO. 18703

NOTICE OF PROPOSED RULE MAKING*

Adopted October 15, 1969 ; Released October 17, 1969

By the Commission:

1. Notice is hereby given of the proposed rule making in the above-entitled matter.

2. Under the Commission's existing tariff rules, there is no requirement that customers be given any notice of tariff changes over and above the constructive legal notice given by the mere physical filing of the official tariff documents with us plus the posting of copies of tariffs at certain locations in the operating territory of the filing carrier where, in theory, the public may inspect them.

3. The aforementioned notice requirements may no longer be adequate, particularly in those cases where there are increases in charges, or where there is some change that effectuates discontinuance, reduction or impairment of service. The number and complexity of tariffs filed with us are growing and it appears likely that many customers that may be adversely affected thereby will not physically inspect the official copies on file with us or those posted in the operating territory of the filing carrier or otherwise learn of the filing of significant tariffs.

4. We propose in the attached notice a rule which would require the carrier to give additional notice to affected customers whenever tariffs are to be filed that involve increases in charges or any discontinuance, reduction or other impairment of service to any customer. At the outset, we would allow the filing carrier to choose the means most suitable under the circumstances for such notice in each case. This is because no one method would appear to be best under all circumstances. In some instances, for example, a newspaper ad may be sufficient. In other cases, some other method might be called for. Whatever method is used, the carrier would be required to state in its tariff transmittal letter what was done.

* Not part of record certified by Commission.

5. In addition we propose to amend the provision requiring letters of transmittal to contain the reasons for all changes in charges or regulations plus a justification therefor if such change results in a rate increase. It has become apparent that many carriers are providing only the minimum amount of information necessary to comply pro forma with the rule. Our proposed rules will restate the original intent of this provision by making more explicit the types of information we feel are necessary for the Commission to effectively evaluate a rate and/or regulation change or new tariff offering. These rules will require the carrier to consolidate and present at the time of filing the tariff matter, the relevant data that the carrier has used in determining whether to make such change or new offering.

6. Under the existing provision it has become necessary for the Commission to request additional information of the carriers before the staff can evaluate tariff filings. Such requests and the time lag before compliance have created serious problems. Generally, the Commission is restricted by Section 204 of the Communications Act to a suspension period of 3 months before a properly filed tariff becomes effective. This coupled with the present 30 days notice requirement contained in the Rules and Regulations (47 C F R 61.58) allows the Commission only approximately four months to evaluate, if necessary suspend and investigate, go through hearings, and reach a decision on the lawfulness of a tariff. Because of the inadequacy of the information given by the carriers pursuant to the existing tariff provision, and the time necessary to get adequate information, the 4 months period has become totally inadequate. The proposed rules regarding information to be provided would cut the time period required for the evaluation process, and hearing procedure if necessary. In addition to a better information base, we propose to increase the notice requirement for tariff changes that constitute a rate increase from the present 30 days statutory notice to 60 days. Section 203(c) of the Act permits the Commission in its discretion, when good cause is shown, to modify the statutory notice requirement by a general order applicable to special circumstances or conditions. For the foregoing reasonings, we believe that such a modification is imperative if the Commission is to have enough time to perform its statutory duties.

7. It should be noted that the intent of these proposed rules is to reduce the number of tariff filings ordered for hearing. The rules envision that with better information available to the staff, many hearings might be avoided and that the public interest will be better served.

8. The proposed rule concerning statistical data has a similar purpose. It is to be envisioned that much of the supporting data for any or changed tariff matter will be supported by scientific statistical studies. Yet the evaluation of these studies is time-consuming and in some cases impossible without the information that would be required by the rule. Again, since such information would already be in existence and readily accessible to the sponsor of a statistical study, we can see no hardship in the routine submission of such data. Further, to give application to this principle whenever statis-

tical studies are to be used, we are proposing to make the admissibility into evidence of any such studies dependent upon the furnishing of the required information.

9. Authority for this proposed rule-making is contained in Section 4(i), 203(a), (b), and (d), and 204 of the Communications Act. Interested persons are invited to comment on the proposals herein. Comments shall be filed on or before November 25, 1969, and reply comments on or before December 5, 1969. In reaching its decision in this matter, the Commission may also take into account any other relevant information before it, in addition to the comments invited in this Notice.

10. In accordance with the provisions of Section 1.419 of the Commission's Rules and Regulations, an original and fourteen copies of all statements and briefs shall be furnished to the Commission.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

Attachment - Appendix

A P P E N D I X

- I. In Part 1 of Chapter I of Title 47 of the Code of Federal Regulations, §1.363 is added, to read as follows:

§1.363 Introduction of statistical data.

(a) All scientific statistical studies, including but not limited to sample surveys, experiments, and econometric analyses, shall be described in a summary statement, with supplementary details added in appendices so as to give a comprehensive delineation of the plan and procedures undertaken, including, but not limited to, the definition of the sampling frame, the definition of the sampling units, the method of selecting the sample, the characteristics measured or counted, formulas used for statistical estimates, standard errors and test statistics, description of statistical tests; plus all related computations, computer programs, lists of input data and statements of result.

(b) If the evidence did not arise from a scientific statistical study, then a clear statement should be made regarding all underlying assumptions and judgments, and techniques of collection, estimation, and/or testing.

- II. In Part 61 of Chapter I of Title 47 of the Code of Federal Regulations, Sections 61.32, 61.33(a), and 61.58 are revised and Sections 61.21, 61.22, 61.38, 61.39, and 61.69(c) are added, to read as follows:

§61.21 Rate increase.

The term "rate increase" whenever used in this part means a change in tariff schedules which results in an increased charge to any of the carrier's customers.

§61.22 Rate decrease.

The term "rate decrease" whenever used in this part means a change in tariff schedules no part of which results in an increased charge to any of the carrier's customers.

§61.32 Publications to be sent to Secretary, FCC and commercial contractor,

Publications sent for filing shall be addressed to "Secretary, Federal Communications Commission, Washington, D. C., 20554." Concurrently with the filing of the publication with the Commission, the filing carrier shall transmit a copy of the publication to the commercial firm or firms with whom the Commission annually awards a contract to make copies of Commission records and offer them for sale to the public. Currently, the contractor is Cooper-Trent, Inc. 1130-19th Street, N.W., Washington, D. C. 20006.

§61.33 Letters of transmittal.

(a) * * *

(Exact name of carrier in full)
Tariff Department,

(Post Office Address) -----

-----, 19 ____
(Date)

Transmittal No. ____

Secretary,

FEDERAL COMMUNICATIONS COMMISSION,

Washington, D. C. 20554.

ATTENTION: Common Carrier Bureau

The accompanying tariff (or other publication) is sent to you for filing in compliance with the requirements of the Communications Act of 1934, as amended, issued by

-----, and bearing
(Carrier)

FCC No. ___, effective _____, 19 ____.

(Suppl. No. ___ to FCC No. ___, effective _____, 19 ____.) (___ revised page ___ of FCC No. ___, effective

_____, 19 ____.) (FCC Concurrence

No. ___, effective _____, 19 ____), etc.

(Here give a statement describing the method of giving the additional notice required by §61.58.)

* * * * *

§61.38 Material to be submitted with letters of transmittal by filing carriers.

(a) Explanation and data supporting changes and/or new tariff offering.

The material to be submitted for a tariff change considered a rate increase or a rate decrease or for a tariff filing which is for a service not previously offered, shall include:

(1) an explanation of the changed or new matter, the reasons for the filing, and the basis of ratemaking employed, (2) economic data and/or information to support the changed matter including:

(i) a cost of service study for all elements of costs for the most recent 12 month period; and a similar study

containing a projection of costs for a three year period beginning at the date of the filing of the changed tariff matter; and

- (ii) estimates of the aggregate effect of the changed matter upon the carrier's traffic and revenues from the service to which the changed matter applies and to the overall traffic and revenues of the carrier and an explanation of the basis for the estimates (including data as to past traffic and revenues and projections of the traffic and revenues for a three year period beginning at the date of the filing of the changed tariff matter).

(b) Working papers and statistical data.

- (1) There is to be furnished to the Chief, Common Carrier Bureau, upon filing of any tariff change considered a rate increase or decrease or for a tariff filing which is for a service not previously offered, two sets of working papers for use by the staff. These working papers shall contain the information underlying the data supplied in response to paragraph (a) of this section. A clear indication shall be made as to how the working papers relate to information supplied in response to paragraph (a) of this section.
- (2) All statistical studies will be submitted and supported in the form prescribed in §1.363 of this chapter.

(c) Exception.

If the tariff matter being filed by the issuing carrier contains charges, and classifications, practices, and regulations affecting such charges for a connecting carrier, it will be the duty of the connecting carrier to provide the data and/or information in paragraphs (a) and (b) of this section for its charges, and classifications, practices, and regulations affecting such charges on the date the tariff matter is filed with the Commission by the issuing carrier.

§61.39 Use in hearing proceeding of material submitted with letters of transmittal.

For all rate increases, the material submitted with the filing shall be of such composition, scope, and format that it could serve as the carrier's complete case-in-chief in the event the rate increase is set for hearing to commence on a date within six months from the date of filing.

§61.58 Notice Requirements.

Every tariff, supplement, revised page and additional page of a tariff which does not constitute a rate increase, shall bear an effective date and, except as otherwise provided by regulation, special permission, or order of the Commission, shall give the full statutory notice of 30 days to the public and to the Commission regardless of whether or not changes are effected thereby. Every tariff, supplement, revised page and additional page of a tariff which does constitute a rate increase shall bear an effective date and, except as otherwise provided by regulation, special permission, or order of the Commission, shall give 60 days notice to the public and to the Commission regardless of whether or not changes are effected thereby. Notice shall be given primarily by filing with the Commission such proposed tariff publications. In addition to this notice, if the tariff publication proposes to increase any charge or to discontinue, reduce or otherwise impair service to any customer, the filing carrier shall take such steps as are appropriate under the circumstances to inform the affected customers of the impact of the tariff publication. Any period of notice required herein shall begin on and shall include the date the tariff is received by the Commission, but shall not include the effective date. In computing the notice required, Sundays and holidays shall be counted.

§61.69 Rejections.

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(c) Failure of the carrier to comply with any provision of this part will be grounds for rejection of the tariff material being submitted for filing.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of)	
)	
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,)	Transmittal No. 10609
LONG LINES DEPARTMENT)	
)	
Revisions of Tariff F.C.C. No. 260,)	
Series 5000 Service (TELPAC))	

To: The Commission En Banc

PETITION OF
THE NATIONAL ASSOCIATION
OF MOTOR BUS OWNERS

Comes now the National Association of Motor Bus Owners (NAMBO), pursuant to the Communications Act of 1934, and respectfully petitions that the Commission reject, reschedule the effective date or take such other action as it may deem appropriate to hold in abeyance the increase in rates for TELPAK C and D services contained in Transmittal No. 10609, filed October 1, 1969, and currently scheduled to become effective November 1, 1969, until resolution of the various issues relating to the TELPAK offering pending in Docket 18128. Alternatively, NAMBO requests that such increase be suspended (for the full statutory period), investigated and subjected to accounting requirements. In support hereof, NAMBO respectfully states as follows:

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1. NAMBO, incorporated under the laws of the District of Columbia, is the national trade association for intercity motor bus passenger carriers. Its membership includes the Greyhound system, all carriers affiliated with the National Trailways system, and more than 400 independent bus operators. NAMBO's members hold authority from the Interstate Commerce Commission for the transportation of persons and property in interstate commerce, pursuant to the Interstate Commerce Act. These motor bus carriers provide about 90 percent of the intercity motor bus transportation in the United States. In addition to the transportation of passengers, these carriers engage in package express and mail service. In providing this transportation, a number of NAMBO's members make considerable use of the private line services of A.T.&T., including TELPAK services. TELPAK is an important part of the communications system employed by these members for the operation and control of equipment and the other activities involved in the furnishing of bus transportation. NAMBO has participated as an intervener in the Private Line Case, Docket No. 11645, et al., the TELPAK Case, Docket No. 14251, the TELPAK Sharing Provisions Case, Docket No. 17457, and the AT&T General Rate Investigation, Docket 16258. NAMBO previously opposed the TELPAK rate increases filed by A.T.&T. in 1968, now under investigation in the Interim TELPAK Rate Increase Case, Docket No. 18128.

2. Only fourteen months ago, TELPAK users were subjected

to a major rate increase which is now awaiting hearing in Docket 18128. The instant increase, also of major proportions, when added to this prior increase results in a doubling of TELPAK rates in little over a year's period:

	<u>Original Rates</u>	<u>Rates Effective Since Sept. 1, 1968</u>	<u>Proposed Rates Effective Nov. 1, 1969</u>
<u>Base Capacity</u>			
TELPAK C	\$25	\$28	\$30
TELPAK D	45	60	85
<u>Service Terminals, Connecting Arrangements</u>	15	25	35
<u>Additional Terminals and Arrangements</u>	5	10	15
<u>Telegraph/Telephone Equivalency</u>	12/1	6/1	2/1

3. The member companies of NAMBO would be adversely affected in significant fashion if the Commission permits A.T.&T. to impose its wholly unjustified "second round" TELPAK rate increase upon its customers. Such increase would again drastically raise the TELPAK costs of NAMBO's members. If permitted to become effective, the inevitable result would be cutbacks in communications usage, elimination of plans for expansion of communications service by these companies, and serious consideration of competitive alternatives to A.T.&T.'s private line service.

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4. NAMBO respectfully submits that the proposed increases are in violation of the Commission-approved settlement in Docket No. 16258, contrary to the policies and directions of the Commission in regard to A.T.&T.'s rates, and fundamentally inconsistent with proper regulatory agency procedures in rate investigations.

5. The Statement of Rate-Making Principles and Factors agreed to by the parties and approved by the Commission in Phase I-B of Docket No. 16258 (FCC 69-842) provided for participation by interested persons in the formulation of cost study methodology such as that used by A.T.&T. in the instant filing:

"11. In order to determine LRIC and FDC for the major categories of interstate service, the Bell System, in consultation with the FCC staff, will undertake to develop appropriate methods to be used in the production of LRIC and FDC studies at regular predetermined intervals and will go forward as promptly as possible to produce up-to-date cost data. By such formal or informal procedures as the Commission deems appropriate, interested persons will be afforded a timely opportunity to express their views with respect to the formulation of the appropriate methods." (Emphasis supplied.)

Neither NAMBO nor any other party to Docket No. 16258 has had any opportunity for meaningful participation in the development of the costing methodology employed by A.T.&T. Further the settlement agreement specified that this participation was to continue through to final development of the methodology and completion of the costing studies. Thus paragraph three of the procedures for implementing

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the agreed-upon principles provided: "No carrier initiated rate level increases will be filed until the new cost studies described in paragraph (2) have been completed and made available to the parties hereto." (Emphasis supplied.) NAMBO has never been served with such new cost studies. It is also NAMBO's understanding that no party received such cost studies sufficiently in advance of the rate filing to permit their proper review and evaluation. The A.T.&T. rate filing here involved is thus in direct violation of this Commission-approved settlement agreement and should be rejected on this ground alone. The Supreme Court's Texaco decision,^{1/} discussed hereinafter, is clear authority for such rejection.

6. The proposed new TELPAK rates should also be rejected because they are predicated upon an unauthorized rate of return. The Commission determined in Phase I-A of Docket No. 16258 that 7 to 7½% is the range of reasonableness of A.T.&T.'s rate of return on its interstate operations (FCC 67-776; FCC 67-1047). Yet the instant filing is based on an 8½% rate of return in clear violation of the Commission's determination on an evidentiary record. A.T.&T. fails to offer any reason or justification for the use of a higher rate of return, despite the fact that its use manifestly produces a significant part of the total increase in charges. Such action by A.T.&T. also warrants, in and of itself, rejection of the filing.

^{1/} FPC v. Texaco, Inc., 377 U.S. 33 (1964).

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7. Moreover, it must be emphasized that the only determination the Commission has made to date concerning A.T.&T.'s interstate rates is that, from an over-all standpoint, they have been excessive. Thus in Phase I-A of Docket No. 16258, the Commission found that A.T.&T. was earning an excessive rate of return and ordered that interstate revenues be reduced by \$120 million (FCC 67-776; FCC 67-1047). Despite this, A.T.&T. has continued to earn "well in excess of 8% on interstate operations" (FCC 68-667). It realized a rate of return of 8.3% for the first half of 1969, anticipates a return of 8.1% for the full year and an increase to 8.5% in 1970 or 1971.^{2/} In the face of this situation - earnings far in excess of the authorized rate of return - the only proper interim rate adjustments in regard to any interstate services would appear to be downward adjustments. This is particularly true when it is realized that no determination has been made as to proper cost allocations as among A.T.&T.'s interstate services. While cost allocation studies have been presented (the 7 Way Cost Study in the Telegraph Service investigation, the Broad Brush Updating of such study in Docket No. 16258 and the 9 Way Cost Study in the same proceeding), none of these studies has ever been tested by cross-examination, nor has there been any adjudication of their validity by the Commission. In such a posture, the regulated carrier is not

^{2/} "Continuing surveillance" meetings, September, 1969.

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in a position to press for interim rate increases on particular services to soften the impact of the over-all interim decrease which is required. Cf. F.P.C. v. Tennessee Gas Co., 371 U.S. 145, 152-3 (1962). The effort by A.T.&T. to pile another interim rate increase on the backs of its TELPAK customers when the only adjudication to date has demonstrated an over-all excess in interstate rates is clearly contrary to the Commission's own determinations and patently inconsistent with proper procedures in rate investigations. As in the case of the previous reasons for rejection, here also the Commission has authority to prevent the filing from becoming effective, as hereinafter shown.

8. Federal agencies clearly have the power to develop policies or make determinations restricting or eliminating the right of a regulated carrier to pyramid rate increases which would unjustifiably injure the consuming public. Thus in F.P.C. v. Texaco, 377 U.S. 33 (1964), the Supreme Court upheld an FPC policy which outlawed indefinite price change provisions in gas producer contracts and provided that rate increases based on such provisions would be rejected. The Court cited with approval the Commission's rationale that it was protecting the public "against waves of increases which have no defensible basis" (id. at 43) and held:

"Natural gas companies that seek to enter the field with prearranged escalator clauses and the

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like have a built-in device for ready manipulation of rates upward. Protection of the consumer interests against that device may be best achieved if it is given at the very threshold of the enterprise. At least the Commission may so conclude * * * ."

In the Permian Basin Area Rate Cases, 390 U.S. 747 (1968), the Supreme Court upheld the authority of the FPC after completion of an area rate proceeding to impose a 2½ year moratorium on rate increase filings by gas producers. The Court stated (id. at 779):

"Certain of the producers urge that §§4 and 5 must in combination be understood to preclude moratoria upon filings under §4(d). They * * * reason that §4(d) creates an unrestricted right to file rate changes, and that such changes may, under §4(e), be suspended for a period no longer than five months. If this construction were accepted, it would follow that area proceedings would terminate in rate limitations that could be disregarded by producers five months after their promulgation. The result, as the Commission observed, would be that the conclusion of one area proceeding would only signal the beginning of the next, and just and reasonable rates for consumers would always be one area proceeding away.* 34 F.P.C., at 228."

And in United Gas v. Callery Properties, 382 U.S. 223 (1965), it was held that the FPC can prohibit the filing of increased producer rates above a specified level until determination of rates for all producers in the area in an over-all rate investigation. Even the separate opinion which concurred in part and dissented in part recognized that the regulated companies had no "invincible right to raise prices subject only to a six-month delay and refund liability." (Id. at 232.)

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9. The foregoing cases are all the authority needed for the rejection action here requested. Clearly A.T.&T.'s instant filing violates prior Commission policies and determinations (e.g., the requirements of the Commission-approved settlement, the 7 to 7½% rate of return finding and the determination that over-all A.T.&T. interstate rates are excessive) just as much as the prohibited rate increase filings involved in the Texaco, Permian Basin and Callery cases. Moreover, the Commission has the express power under Section 203(b) of the Act to modify the thirty-day notice requirement in regard to the filing of rate changes. Normally this is utilized to shorten the notice period, but it is wholly consistent with the Texaco, Permian Basin and Callery cases for the Commission to determine based on this statutory provision that "for good cause shown" the thirty-day notice period should be materially extended to prevent frustration of its regulatory processes and irreparable damage to the consuming public. The Commission thus has the clear power to hold the instant rate increase in abeyance until completion of the pending Docket 18128 rate investigation either by an outright rejection of the increase or by extending the required notice period until the end of such proceeding. In either event, the moratorium required in the public interest can be achieved in a legally-defensible fashion.

10. This is clearly a situation where a moratorium on interim rate increases is essential to protect the regulatory

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processes of the Commission and prevent prejudice and serious injury to the consuming public. It must be emphasized that the presently-proposed increases, if accepted by the Commission, will constitute the third unresolved level of TELPAK rates on file at the Commission. No determination has yet been made as to the compensatory nature of the original TELPAK C and D rates (although they have been found required by competitive necessity) or of the over-all lawfulness of the rate increase which became effective September 1, 1968. To pile another large interim rate increase on top of these two yet-to-be resolved rate levels is clearly contrary to proper and fair rate-making procedures. It is no answer simply to suspend each increase and impose accounting requirements. It has long been recognized that the suspension and refund approach does not afford adequate protection to consumer interests. FPC v. Tennessee Gas Transmission Co., 371 U.S. 145, 154-55 (1962). See also United Gas Improvement Co. v. Callery Properties, 382 U. S. 223, 228 (1965); FPC v. Hunt, 376 U. S. 515, 524 (1964); City of Chicago v. FPC, 385 F. 2d 629, 644 (D.C. Cir. 1967), cert. denied 390 U.S. 945 (1968). Suspension and accounting will seriously damage NAMBO's members and the traveling public they serve. It will also tend to prejudice the rights of such users to a fair determination of the issues in regard to the proper level of TELPAK rates since, as a practical matter, the

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piling of rate increase upon rate increase lessens the opportunity for a full adjudication of the validity of the lower rate levels buried beneath the increases. Rejection of such pyramiding efforts is the only way to insure a fair proceeding and full protection to the public from injury.

WHEREFORE, NAMBO respectfully prays that the Commission take whatever action is required to postpone the effectiveness of the above-described TELPAK rate increases until resolution of the various TELPAK issues in Docket 18128 or, in the alternative, that such increases be suspended, investigated and subjected to accounting requirements, and that the Commission grant such other and further relief as to the Commission may seem proper.

Respectfully submitted,

NATIONAL ASSOCIATION OF MOTOR BUS
OWNERS

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Of Counsel

Dated: October 17, 1969

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of)
)
AMERICAN TELEPHONE AND TELEGRAPH) Transmittal No. 10609
COMPANY - TELPAK Rates)

OPPOSITION

American Telephone and Telegraph Company (AT&T),
for its opposition to the pleadings* addressed to the TELPAK
rate increases filed October 1, 1969 under the above Trans-
mittal, respectfully states as follows:

Preliminary Statement

1. The TELPAK rates filed October 1 have been
selected on the basis of intensive studies of costs and

* To our knowledge, to the date of this Opposition, petitions for rejection or withdrawal of the new TELPAK tariffs, or for rescheduling of their effective date, have been filed by the Department of Defense (Government); Associated Press (AP); jointly by Bethlehem Steel and certain other manufacturing companies (Bethlehem); Aeronautical Radio, Inc. (ARINC); jointly by Air Transport Association of America, Aeronautical Radio, United Airlines and Eastern Airlines (Airlines); National Association of Motor Bus Owners (NAMBO); and Aerospace Industries of America, Inc. (AIA). With the exception of AIA, all of the above parties and Emery Air Freight Corporation (jointly with Airlines), have also petitioned for suspension of the tariffs. In addition, petitions for suspension have been filed by Association of American Railroads (AAR); Penn Central Transportation Company (Penn Central); Chicago, Rock Island and Pacific Railroad (Rock Island); and American Trucking Associations, Inc. (ATA). Because many of the points discussed are common to one or more of the suspension petitions and the other pleadings listed above, the filing parties will be referred to collectively as "Petitioners" unless specific reference is otherwise made. Unless otherwise noted, the citations will be to those pleadings requesting relief other than suspension.

market conditions. These studies have been made pursuant to and in conformity with the Statement on Ratemaking Principles and Factors agreed to in Docket No. 16258, Phase 1-B (Appendix A of the Commission's Memorandum Opinion and Order, adopted July 29, 1969, 18 F.C.C.2d 761, 765). In the development of the methodology used in these studies there was continuing consultation by AT&T with the Commission's Staff, and interested users were afforded timely and ample opportunity to express their views. Every effort has been made to ensure that these studies are of the highest caliber and they represent what we believe to be the most comprehensive analysis of its kind ever presented to this Commission. In conducting these studies, we have had the advantage of almost a decade of experience with the furnishing of TELPAK service. The results of these studies confirm the fact that rate action is needed to improve the revenue/cost relationship for this service so that it may provide an appropriate contribution to our overall interstate revenues, with consequent benefits to the users of our other services. Earlier studies indicated such a need for rate action. (E.g., Bell Exs. 24A and 24B and FCC Staff Ex. 41 in Docket No. 16258.) Rate increases to the level now filed were proposed in January 1967, filed in February 1968, and voluntarily withdrawn in favor of lower interim rates upon the plea of customers that rate increases of the magnitude proposed were too large for them to absorb

immediately. Those interim rates have now been in effect for over a year. Our present studies show they are too low. In these circumstances the rates filed October 1, 1969 should be permitted to go into effect with the minimum of delay.

2. In addition to statutory suspension pursuant to § 204 of the Act, Petitioners variously request the Commission to grant the following extraordinary relief: rejection of the tariff revisions; requirement of their withdrawal; rescheduling of their effective date until 60 days after the investigation in Docket No. 18123 is completed; staying the increases until a determination by the Commission of the lawfulness of the present rates. It is our position that the Commission should not grant the extraordinary relief requested by Petitioners and in fact is without power or authority to do so. The requested oral argument would serve no useful purpose. With respect to suspension of the proposed rates, any such suspension should be limited to the minimum period required for an accounting order under § 204 of the Act.

THERE IS NO BASIS FOR THE EXTRAORDINARY
RELIEF REQUESTED OR FOR DEFERMENT OF THE
SCHEDULED EFFECTIVE DATE OF THE PROPOSED RATES

3. In support of their requests for Commission action to defer the TELPAK rate increases now scheduled to take effect on October 1 the Petitioners have advanced a variety of arguments. It will be shown that none of these

argument could be a basis for the extraordinary relief requested.

Alleged Disruption of the Administrative Process

10. It is urged that the Court should grant the extraordinary relief requested on the ground that during the proposed rate adjustment period the regulation of the law business of the presently operating utilities would be in an improper manner and could result in a disruption of the orderly process of rate adjustment.

11. Important here is the fact that - contrary to the assertion that the Court should not interfere with the regulation of the utilities - the Commission has not decided what it expects and desires not to adjust the rates of such as El Paso and that the law business of such utilities will be considered in Docket No. 1815. In a similar manner, an opinion and order released August 7, 1960 in Docket No. 1815 (P.O.D. 7611) the Commission recognized that it would file rate adjustments on October 1, 1960 (para. 10) and that with respect to "ELPA" adjustments the lawfulness of such filings could be resolved in Docket No. 1815 (para. 10 and 10). In fact, after a reading of that opinion, the Commission is in a position that one

* To our knowledge, there has been no timely filed pleading protesting or requesting reconsideration of that decision.

of the forces motivating the Commission to terminate the proceedings in Phase 1-B of Docket No. 16958 and to approve the procedures embodied in the Statement of Ratemaking Principles and Factors in Docket No. 16958 was the prospect of timely rate adjustments based on the studies made pursuant to the Statement* with the opportunity to consider such TELPAK adjustments in Docket No. 18128. Such action will not prejudice the determination of the lawfulness of the presently existing TELPAK rates which are currently at issue in Docket No. 18128 and are not removed therefrom by the incorporation in that proceeding of the rates filed October 1, 1969. On the contrary, as found by the Commission, this procedure "will best conduce to the proper exercise of [the Commission's] statutory authority and promote the ends of justice." (18 F.C.C.2d 761, 764.)**

6. In addition, the Airlines appear to argue that determinations as to the compensativeness of the original TELPAK C and D rates and the issues of ratemaking principles are conditions precedent to a determination of the lawfulness (and presumably therefore the effectiveness) of the proposed

* It was provided in the Statement that the Bell respondents "propose to make new studies in conformity with the principles agreed to herein, and thereafter to file such further specific rate adjustments as may be consistent therewith." (18 F.C.C.2d at 768 (para. (2)).)

** Such action was clearly within the discretion of the Commission. *Eastern Airlines v. Civil Aeronautics Board*, 294 F.2d 1007 (D.C. Cir. 1961).

rates (Airlines, paras. 15-17). Such an argument flies in the face of the above Statement in Docket No. 16098 to which the Airlines were a party and the above-cited Memorandum Opinion and Order of August 7, 1969 to which the Airlines did not object. Both the Statement and the Opinion contemplate a consideration of the Airlines' request No. 14751 issue as to the compensation of the AK C and D and of general ratemaking principles in further proceedings dealing with those rate adjustments contemplated by the Statement (see particularly parts. 9-10 of the Memorandum Opinion and Order (18 F.C.C.2d at 767-69) and procedural parts. 11-15) of the Statement (18 F.C.C.2d at 767)).

4. No authority is cited for the proposition that a carrier may not file a rate increase simply because there has not yet been a determination in a hearing then pending pursuant to § 205 of the Act concerning the lawfulness of previous increases in rates. A reading of the pertinent provisions of the Act reveals that no such prohibition is expressed or even implied and the Commission has never so ruled. Indeed it is common practice for natural gas companies acting pursuant to the similar provisions of the Natural Gas Act (§ 4) (15 U.S.C. 717c) to file successive rate increases when previously filed rate increases are under investigation. See Willmut Gas and Oil Co. v. Federal Power Comm'n., 294 F.2d 245 (D.D.C. 1961),

court. denied, 368 U.S. 975 (1962), rehearing denied, 369 U.S. 813 (1962). In that case United Gas Pipeline Company filed rate increases which were suspended by the Federal Power Commission for the statutory period of five months and set for hearing. During the pendency of the investigation, United filed successive rate increases which were similarly suspended and set for hearing. With respect to one of the subsequent filings the appellant moved the Commission to reject the filing. The Commission inferentially refused and the matter was taken up on appeal. The court held that the Federal Power Commission had acted to the full extent of its authority stating (369 U.S. at 249):

"... The Commission's power with respect to a filed increase is found in Section 4(e): to initiate a hearing as to the lawfulness of the changed rates; to suspend their effectiveness for a time, and to order refunded that portion of the increase which, after hearing, it determines to be unlawful. Thus the Act provides for investigation of changed rates which have been filed; but it does not contemplate that the Commission may refuse to file a tendered new schedule showing changes in rates, or that it may summarily reject or disallow the new schedule without a hearing."

Alleged Inconsistency of the Supporting
Studies With the Docket No. 16258
Statement of Rate-making Principles

8. It is argued that Petitioners are entitled to the extraordinary relief requested because the procedures followed by AT&T with respect to the supporting studies are inconsistent with the Statement of Rate-making Principles and

Factors agreed to in Docket No. 16258. The reasons urged are essentially the same reasons advanced by the broadcasters in connection with the television transmission rates filed August 29, 1969,* i.e., that Petitioners did not have an adequate opportunity to participate in the formulation of the methodology employed and that the studies were not timely furnished to them.

9. As noted by Petitioners, pertinent parts of the Agreement are as follows:

"11. In order to determine LRIC and FDC for the major categories of interstate services, the Bell System, in consultation with the FCC staff, will undertake to develop appropriate methods to be used in the production of LRIC and FDC studies at regular predetermined intervals and will go forward as promptly as possible to produce up-to-date cost data. By such formal or informal procedures as the Commission deems appropriate, interested persons will be afforded a timely opportunity to express their views with respect to the formulation of the appropriate methods." (Emphasis added.)

* * * * *

"(3) . . . No carrier initiated rate level increases will be filed until the new cost studies described in paragraph (2) have been completed and made available to the parties hereto" (18 F.C.C.2d 761, Appendix A, para. 11, procedural para. (3).)

Thus, there are three requirements:

- (1) Bell System consultation with the FCC Staff in the development of cost study methods;

* See "Petition for Rejection or Suspension and for Other Relief" dated September 19, 1969, in connection with Transmittal No. 10563.

- (2) Timely opportunity for interested persons to express their views with respect to formulation of cost study methods; and
- (3) Availability of cost studies to the parties at the time a carrier initiated rate increase is filed.

10. Petitioners make no allegation concerning consultation between Bell System representatives and the FCC Staff. In fact, as contemplated by the Agreement, Bell System representatives have worked closely with the Commission's Staff in making these studies. Members of the Staff have been kept informed of the details of the studies and have been consulted continuously with respect to the methodology to be followed. Moreover, as far as timely opportunity for interested persons to express their views is concerned, there have been a number of general public meetings in which interested user representatives, including Petitioners requesting extraordinary relief,* have participated. In addition, there have been many meetings between representatives of Bell and those users who accepted Bell's continuing invitation to have such separate conferences.** At these various meetings, substantial amounts of data, including

* As to AIA and Bethlehem, see infra, para. 15.

** In addition to the meeting dates set forth in Airlines' Petition (p. 19), AT&T met with representatives of Airlines on July 16, July 28, and September 4.

details as to the cost and market analyses, have been supplied to the participants, and there have been lengthy and detailed presentations and discussion of the methods of these analyses.

11. The basic methodology of the market study was furnished to interested users on June 30, 1969 with full opportunity for comment. Preliminary results of the market study were furnished to Airlines representatives as early as September 10 and to Airlines representatives and other interested users on September 18. Copies of AT&T's cost studies with respect to the program services, in which the same general methodology as in the TELPAK cost studies was employed, were furnished to interested users, including the Airlines, as well as being made publicly available, prior to the filing of the program services tariff revisions on August 29. Copies of the TELPAK market and cost studies were made available in AT&T's offices in New York and Washington on September 26 and September 29 and delivered to some interested users on those dates and to others on October 1 (the date of the TELPAK filing).*

12. The crux of the position taken by Petitioners is that they were not afforded a timely opportunity to express their views with respect to the formulation of appropriate cost

* NAMBO alleges (p. 5) that the cost studies were never served upon it. As indicated above, and as conceded by NAMBO, the Docket No. 16258 Agreement does not require service of these studies but only requires making such studies available and that requirement has been met insofar as NAMBO is concerned. Moreover, attorneys for Airlines who are members of the same law firm as counsel for NAMBO have been furnished material as indicated above.

study methods. They have had that opportunity, as the above discussion shows. AT&T representatives have expended considerable effort to give the parties as much information as was reasonably available regarding the cost studies as they developed. At the numerous meetings attended by interested users, AT&T explained the cost study methodology to the fullest extent possible at that stage of the study development. At these meetings, representatives of Petitioners, particularly the Airlines, expressed their views regarding certain facets of the development of costs. In the process of formulating the cost study methodology, these views were given full consideration. It cannot be doubted that at all times since the Agreement was reached in Phase 1-B of Docket No. 16258 AT&T has been receptive to the expression of views by interested persons with respect to the formulation of appropriate cost study methods and indeed has taken the initiative in seeking out opportunities for exchanges of views with its customers. The Commission did not accept the arguments advanced by the broadcasters as justification for staying the effectiveness of the video tariffs that there had been a failure by AT&T to conform to the Agreement with respect to the requirement for consultation as to cost study methodology. (Memorandum Opinion and Order, released October 6, 1969, Docket No. 18684 (FCC 69-1038).) The instant case is even a stronger one for rejection of such arguments inasmuch

as these Petitioners have had access to, if not actual possession of, copies of the cost studies utilized in connection with the new program rates, at least since August 29, the date of filing such rates; and meetings with Petitioners with respect to cost study methodology were held subsequent to the filing of the program rates.

13. Petitioners seem also to contend that, in alleged contravention of the Agreement, they have been given insufficient time for a detailed study of the cost study material and that for this reason the proposed rates should be rejected or not permitted to go into effect (e.g., Airlines, para. 20). The nature of Petitioners' arguments on this point makes it difficult to conceive of reasonably achievable circumstances under which Petitioners would be willing to concede that they had been given all the opportunities to express their views to which they argue they are entitled. Certainly imposition of the requirement for which they contend would be an unwarranted enlargement of the Agreement. The Agreement calls for "a timely opportunity to express their views" regarding the formulation of cost study methods and the availability of the studies when rate increases based thereon are filed. As shown above, those requirements have been met. (See para. 10 supra; Memorandum Opinion and Order of October 6, 1969 in Docket No. 18684 supra.)

14. No one has suggested that Petitioners should be precluded from reviewing in exhaustive detail the cost study calculations and workpapers. AT&T would be glad to consider any results of such a review called to its attention, and in any event the procedures of the Commission would be available to interested parties. However, such a detailed review should not delay the effectiveness of the tariff revisions.

15. AIA and Bethlehem argue that they are "interested persons" within the meaning of the Agreement but that they were not consulted, and were not given an opportunity to express their views, with respect to the cost study methodology, in violation of the Agreement. The procedures leading up to the formulation of the Agreement as finally constituted and the action of the Commission on July 29 with respect to the Agreement (18 F.C.C.2d 761) are matters of public record.* Likewise the many general meetings held over the period from May to October to discuss study methodology were widely publicized and were open to the public. It is inconceivable

* See Order released February 18, 1969 (FCC 69M-197) setting up the informal conferences which led to the Agreement; Order released May 21, 1969 (FCC 69M-602) setting up a hearing conference to report on areas of agreement among the conferees; Volume 179 of Transcript in Docket No. 16258. In addition there were numerous accounts of these meetings reported in the press.

that AIA and Bethlehem were unaware of what was going on and neither so alleges.* Rather it appears, that while aware of what was occurring, they refrained from participation. Certainly they should not be permitted to use their inaction under such circumstances as a basis for attempting to disrupt procedures reasonably and appropriately agreed to by the parties, approved by the Commission and available to all interested persons. This argument by AIA and Bethlehem should be summarily rejected.

The Allegation That the Supporting Cost
and Market Studies are Defective

16. In addition to arguing that the procedures relating to the studies are inconsistent with the Agreement, Petitioners allege that the studies themselves are subject to certain infirmities. Such allegations are without merit for reasons exemplified in the discussion below (paras. 17-24). But in any event, such criticisms of the "merits" of the studies are clearly matters which are susceptible of resolution under the normal procedures of the Commission for dealing with questions about new tariff filings. Such matters do not constitute grounds for, nor confer authority

* In fact, on June 4, 1969, Aerospace filed with the Commission a Statement "Concerning Proposed Compromise of Phase 1-B of Docket No. 16258." Counsel for Bethlehem is also counsel of record in Docket No. 16258 for two parties, National Association of Manufacturers and American Trucking Associations, Inc.

upon, the Commission to grant summarily the extraordinary relief here requested.

17. Numerous infirmities and deficiencies in the study procedures and results have been alleged. With respect to the market study, for example, it is argued that the results are invalid because the study assumed the maintenance of the existing TELPAK sharing provisions (AIA, pp. 4, 5, 29; Airlines, para. 57), that the market projections are unreliable because they were made without consulting customers (Government, p. 3; Airlines, paras. 53-55), that the market study failed to measure cross-elasticities (Airlines, para. 33), that no effort was made to study the effect of telephone/telegraph equivalencies other than 2-to-1 (AP, p. 8), and that the study failed to take into account the availability of private microwave to aerospace manufacturers (AIA, p. 5), or that the private microwave cost data employed was inadequate to test competitive necessity (Airlines, paras. 50-52). With respect to the supporting cost studies, it is alleged, for example, that the results are incomplete because there was no attempt to determine LRIC by means of an assumed elimination of TELPAK service (Airlines, paras. 32-33; AIA, pp. 24-27), that there is an unjustified disparity in the relationship of revenues to costs as between the base capacity and service terminal elements of the TELPAK rate structure (Airlines, paras. 27-31; AIA, pp. 30-31), and that there has been an improper treatment of depreciation (Airlines, paras. 40-41; AIA, pp. 33-35).

18. Certain of these criticisms are simply incorrect as a matter of fact. In the case of the market study, for example, estimates of cross-elasticity were made and incorporated in the study results (see, e.g., Appendix to Interstate Private Line Market Study, Tab 14). Moreover, present TELPAK rates were studied with the existing 6-to-1 equivalency and with a 2-to-1 equivalency (Test Rate Schedule No. 1) for the purpose of securing information as to the effect of such a change in the equivalency ratio. The market effects of an equivalency change appear to be slight (see Graybook, Tab 3, p. 1). It is also clear from the supporting documentation that in making market forecasts, account managers participating in the study were instructed to consider the availability and probability of use of private microwave for all customers studied, including aerospace manufacturers (see p. 8, Tab 1 of Appendix to Interstate Private Line Market Study).

19. Despite the fact that the TELPAK sharing provisions are now the subject of litigation, it is not yet clear whether the sharing provisions will be changed, or if they are, what such changes will be or when such changes would occur. In these circumstances, it was entirely reasonable to make the market study here involved on an assumption that the existing sharing provisions would be maintained for the period studied. It should be noted that the decision to make this assumption was arrived at after discussion with the Common Carrier Bureau

Staff and that this decision was the subject of discussion at a June 30 meeting in Washington in which interested users participated.

20. Considering the fact that customer responses to any marketing questionnaire would obviously be conditioned by their knowledge of the effect which such responses could have on study results, it was reasonable and prudent to omit customer inquiries in the interest of obtaining unbiased results. Taking into account the unique capabilities of the account managers and industry specialists (Graybook, Tab 6, pp. 1, 2, and 8) and the character of the private line market, the study methods utilized were appropriate.

21. The Airlines' criticisms of the private microwave cost study made by Page Communications Engineers, Inc. are also misplaced. Although it was not the sole source of information of private microwave costs utilized by Bell, the Page study represents a most painstaking and comprehensive effort to obtain an objective appraisal of the costs of a private microwave system having the capacity and performance parameters presented by the Airlines in ARINC Ex. 3 in Docket No. 16258. The relevance of the Page study in helping to assess the competitive situation is readily apparent.

22. The criticisms of the cost studies mentioned above are likewise without merit. An incremental analysis of the private line market, assuming the elimination of TELPAK,

was unnecessary for purposes of determining appropriate TELPAK rate adjustments. The results of such a study may have relevance, along with other factors, in considering whether maintenance of the TELPAK service itself is advantageous. AT&T indicated several times at meetings with interested users, that it would be willing to undertake such a study, and the study is, in fact, now under way. It is expected that the results of the study will be available for presentation in Docket No. 18128.

23. With respect to the alleged disparity in the revenue/cost relationship as between the base capacity and service terminal elements of the TELPAK rate structure, there has never been a requirement that each and every element of a rate structure must bear the same relationship to costs. The Docket No. 16258 Agreement specifically recognizes (para. 16) that within a given class of service, for any particular rate level, more than one rate structure could be appropriate and that structural design should reflect demand as well as cost considerations. It is of interest that in prescribing rates for private line telephone and telegraph channel terminals in the Private Line Case, the Commission recognized that its rates would not recover terminal costs and that a portion would be spread over the line. However, it stated:

"... We find it undesirable to prescribe a channel termination charge as high as indicated by the cost data because of the imperfections in such data and the impact of a charge of such magnitude on users of relatively short pricing sections." (34 F.C.C. 217, 312 (1963).)

In the present circumstances it was determined not to change basically the structure of the TELPAK offering since such a change, in combination with the significant increase in the general level of TELPAK rates, would have an unnecessarily adverse effect upon many customers. Further, we believe the structure permits a pattern of charges which relates reasonably to costs of private systems over a wide range of lengths of haul.

24. The matter of depreciation is a highly complex one to which a great deal of consideration was given in developing the LRIC methodology utilized in AT&T's cost studies. Such consideration has benefited from numerous discussions with interested users and the Common Carrier Bureau Staff. The treatment of depreciation in the studies now presented differs in several significant aspects from its earlier treatment in the full additional cost studies submitted in Docket No. 16258, such differences being largely the product of these discussions. It is believed that the approach now employed is an appropriate one.

25. Thus, in short, we believe that all of the Petitioners' criticisms of the market and cost studies are

misplaced or groundless. As indicated above (para. 16), some of the criticisms raise issues which are complex in nature and whose resolution by the Commission would involve the normal hearing process with full opportunity for presentation, cross-examination, and rebuttal by all interested parties. The Commission would not be justified in taking summary action to defer the effectiveness of the newly filed TELPAK rates on the basis of the Petitioners' criticisms of the supporting studies.

The Assertion That the Rate Filing Is in Violation
of § 204 of the Act and Certain Provisions of the
Commission's Tariff Filing Rules

26. The grounds alleged for the purported violation of § 204 of the Act and certain of the Commission's Rules (§§ 61.33, 61.69(a) and (b), and 61.117), appear to be the lack of a code designation showing the equivalency change proposed by AT&T as a rate increase (AP, p. 3 et seq.; ARINC, p. 9) and the lack of a sufficient statement of justification for the equivalency change proposal in the supporting materials furnished by AT&T. (AIA, pp. 29-30.)

27. There is no violation of the provisions cited by Petitioners. Section 204 provides that at any hearing involving a rate increase the burden of proof is on the carrier to establish the justness and reasonableness of the increase rate. This section imposes no burden of justification on the carrier at the time of filing a rate increase.

28. Section 61.33 of the Commission's Rules deals with letters of transmittal and requires a statement in such letter showing the reasons for all changes in charges and in case any such change results in increased charges, the facts upon which the carrier relies in justification thereof. Transmittal No. 10609 complied fully with this provision of the Rules. It stated the basis for the proposed changes and referred to the accompanying material ("Graybook") for the details of the support for the rate changes. Such procedure is customary where extensive supporting materials are furnished to the Commission. Clearly the letter of transmittal and the Graybook material (with supporting Appendix) show the facts upon which AT&T relies in justification of equivalency change in the rate filing. That Petitioners may disagree with such justification does not alter the fact that these facts have been clearly set forth.

29. The other cited rule sections are wholly irrelevant to the attack made. Sections 61.69(a) and 61.117 of the Commission's Rules deal with procedures with respect to tariffs which have already been rejected. Section 61.69(b) deals with tariffs or supplements issued on less than 30 days' notice, a situation not here present.

30. In the revised tariff, the change in equivalency is marked "C" (i.e., change) and not "I" (i.e., increase),

simply because the equivalency provision is not a rate but a regulation. It should be noted that the present TELPAK tariff shows the equivalency regulation marked with "C" because of the TELPAK changes which became effective September 1, 1968. (Tariff F.C.C. No. 260, 6th Revised Page, p. 81.) Even assuming arguendo that the tariff was inadequately marked, such a technical rule violation would not be grounds for rejecting the tariff as requested.* The whole purpose of this coding is to call attention to the nature of the change being made, and no one can claim lack of notice here.

Alleged Adverse Effect on Petitioners of
the Proposed Rates and Claimed Inadequacy
of Accounting Order

31. Our concern regarding the impact of increased TELPAK rates on customers has been manifested by the decision to withdraw the rates filed on February 1, 1968 in favor of lower interim rates when available studies indicated that the February 1 rates were fully justified.** Nevertheless, for

* The Commission's awareness of existing statutory limitations on its authority to reject a tariff for noncompliance with its rules is evidenced by its legislative program for the 91st Congress, 1st Session. This program shows that the Commission has under consideration a proposal to amend § 203 of the Act to authorize expressly the rejection of tariffs not in accordance with its rules. (Responses to Questionnaire, submitted by Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, Committee Print, 91st Cong., 1st Sess., dated September 9, 1969, p. 45.)

** See Special Permission Application No. 643 dated March 13, 1968 and AT&T Reply dated March 28, 1968 to Petition for Suspension (Transmittal No. 10069).

some time, there has been an evident need to improve the revenue/cost relationship in the TELPAK service. Our studies in evidence in Docket No. 16258 (e.g., Bell Exs. 24A and 24B, 46 and FCC Staff Ex. 41) indicated a poor cost/revenue relationship and the likelihood of improving that situation with rate increases. As early as January 9, 1967,* we informed the Commission and interested users of our intention to raise the rates for this service so that it could make a more appropriate contribution. The studies conducted pursuant to the Docket No. 16258 Agreement have confirmed our earlier conclusions that an increase was required in the September 1, 1968 interim rates in order for this service to make a satisfactory contribution.

32. Petitioners, while alleging adverse impact and even attempting in some instances to translate that impact into dollars and cents, do not relate that monetary impact on their communications costs to their total operating expenses and thus there is not presented a complete or balanced picture of the effect on Petitioners' operations of the proposed rates. In any event such matters are no basis for the extraordinary relief requested.

33. The statutory scheme of the Communications Act contemplates the issuance of an accounting order upon suspension

* Letter of that date from Mr. Garlinghouse to Mr. Waple.

of increased rates if deemed appropriate by the Commission in the particular circumstances. In view of procedural paragraph (3) of the Docket No. 16258 Agreement (18 F.C.C.2d at '68) such an accounting procedure would - in the form now in effect with respect to the presently effective TELPAK rates - apply here. However, it is urged by Petitioners that an accounting order is in the present circumstances inadequate and that the extraordinary relief requested should instead be granted. It should be noted that many of the arguments advanced by Petitioners to support this position were previously advanced by the users and rejected by the Commission in permitting the present TELPAK rates to go into effect September 1, 1968 under an accounting order.*

34. The cases cited by Petitioners do not establish either that the Commission can or should grant the relief requested, in lieu of suspension and investigation and the promulgation of accounting procedures. Federal Power Comm'n v. Tennessee Gas Transmission Co., 371 U.S. 145 (1962) found that the Federal Power Commission had authority to grant interim refunds after a hearing had been held with respect to certain, but not all, of the issues in a rate case under

* See Orders in Docket No. 18128 released September 3, 1968, 14 F.C.C.2d 564; April 12, 1968 (FCC 68-388); and July 16, 1968, 13 F.C.C.2d 853.

the Natural Gas Act where the hearing established that customers were entitled to at least the amounts refunded. This remedy was considered by the Commission and the Court to be superior to the holding of such amounts subject to an accounting order. The action taken was after a hearing and the only real question was whether action had to await a final order in the case. The action taken was not considered to be in any way inconsistent with the statutory scheme of the Natural Gas Act. (See § 4, 15 U.S.C. §§ 717c (c), (d), and (e).) Clearly that case is not pertinent here where no ruling on the basis of a hearing has yet been made. Federal Power Comm'n v. Hunt, 376 U.S. 515 (1964) involved a situation where a temporary certificate was conditioned in the Commission's discretion upon the maintenance of a prescribed price during the period of temporary authorization. The rate procedures under § 4 of the Natural Gas Act (analogous to §§ 203, 204, and 205 of the Communications Act) were held not even to come into play until a permanent or unconditioned temporary certificate had been issued. There is thus nothing in either of these cases which support the requests by Petitioners for extraordinary relief.

Allegation by the Airlines That AT&T
Has Reneged on an Understanding

35. The Airlines allege (paras. 13-14) that by filing the proposed rates AT&T has reneged on an understanding, apparently implicit, that it was to keep the interim TELPAK rates in effect until the Commission, after appropriate findings in some formal proceeding, permitted some different level. The basic assumption underlying the reasoning of Airlines which leads them to this conclusion is that the TELPAK rates filed February 1, 1968 were withdrawn, not because of AT&T's concern over the customer impact of that rate increase, but "because the magnitude of the increase was completely indefensible." This assumption is contrary to fact. As previously indicated (supra, para. 31), the question of customer impact (including the impact on Airlines) was the reason for the withdrawal of the February 1 rates in favor of the lower interim rates and not any doubt as to the propriety and defensibility of the February 1 rates. AT&T was prepared to demonstrate "that TELPAK rates should be established at substantially the level of those filed February 1, 1968."* The existence of any such understanding as claimed by the Airlines is further belied by the Docket No. 16258 Agreement where it was clearly recognized that rate adjustments would be made by

* See AT&T's Reply, dated March 28, 1968, to Petition for Suspension of the interim rates (Transmittal No. 10069) and Special Permission Application No. 643, dated March 13, 1968.

AT&T based on studies to be completed about October 1. (See procedural paras. (1)-(5) of the Docket No. 16258 Statement (18 F.C.C.2d at 768) and Docket No. 16258 transcript, Vol. 179, p. 22342; also discussion supra, paras. 5 and 6.)

The Contention That an Increase in the
Presently Effective Rates Is Improper
Because They Are Compensatory

36. AIA (pp. 24-27) argues in support of its request for extraordinary relief that the supporting studies show the existing TELPAK rates to be "compensatory" and therefore a further increase in those rates is not justified. It is asserted that the Phase 1-B Agreement establishes long-run incremental cost as a floor and that since the interim rates return a "profit" over such floor they are compensatory and appropriate, at least until their lawfulness has been determined after hearing. But even if it were assumed, arguendo, that the difference between estimated end-of-1971 revenues and the product of the incremental unit costs multiplied by total estimated end-of-1971 market quantities, on which AIA relies in this argument, represents a "profit"* and it were further assumed that such a "profit" is proof of compensativeness, this would not by itself establish that the particular rate is at an

* An assumption which would be erroneous because, although a comparison of future revenues and incremental costs gives a measure of a service's expected contribution to earnings, it does not measure "profit," which is an accounting concept related ordinarily to a firm's recorded total operations.

appropriate level. A rate may be compensatory and still be properly subject to change. As pointed out in the Docket No. 16258 Agreement, rate levels for the future should be determined not only with reference to relevant costs but with reference to market conditions and public interest considerations. (18 F.C.C. 2d at 767, para. 14; see also para. 15 which is addressed to the specifics of assessing market conditions.) The filed rates meet the criteria of the Agreement. In equating lawfulness with its concept of compensativeness, AIA misconceives the proper standards for rate evaluation.

Airlines' Allegation That the Proposed
Rates Result in Windfall Profits to AT&T

37. Airlines argue (pp. 8-9) that the extraordinary relief requested is warranted since at the present time AT&T is earning more than the rate of return range determined by the Commission in Phase 1-A of Docket No. 16258 and that the increased TELPAK rates will further increase such earnings and therefore result in a windfall to AT&T. This argument by Airlines is not relevant to the issues before the Commission by reason of the present TELPAK rate filing. The question of what is a fair rate of return for the Bell System's overall interstate operations is subject to being appropriately dealt with in other proceedings and is not involved in this filing. As indicated in Mr. Garlinghouse's letter of October 1, 1969, to the Commission, Bell intends to offset the proposed TELPAK revenue increase with

MTT and WATS revenue reductions. Thus, the question of what action by the Commission may be appropriate with respect to overall rate of return is not affected by the present filing.

THE COMMISSION LACKS POWER TO GRANT
THE EXTRAORDINARY RELIEF REQUESTED

38. As shown above, the grounds advanced by Petitioners to justify their request for deferment of the scheduled effective date of the TELPAK rate changes are without substance. But, apart from the lack of merit in Petitioners' claims, the Commission does not have the power to reject, or compel withdrawal of, the tariff changes in question. Except for the power to suspend for three months available to it under § 204 of the Communications Act, the Commission is without statutory authority, absent a full hearing, to order deferment of the effectiveness of a duly filed tariff beyond the 30-day notice period of § 203. The Commission has itself recognized these statutory bounds on its power to deal with rate changes timely filed under § 203 of the Act. In the Matter of American Telephone and Telegraph Co., 14 F.C.C.2d 564 (1968).

39. In that proceeding, as in this, it was argued that in §§ 4(i), 303(r), and 203 of the Act the Commission could find implied or inherent authority peremptorily to compel deferment of filed TELPAK rate changes for a period beyond that specifically provided in § 204. In denying these requests for extraordinary relief the Commission stated (14 F.C.C.2d at 566):

"10. While the Commission gave careful consideration to the position of petitioners as large volume users of TELPAK services in its Order of investigation in this proceeding, we are without statutory authority to grant the relief requested. Section 204 of the act clearly provides in pertinent part that:

"Whenever there is filed with [the] Commission any new charge * * * The Commission may * * * enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission * * * may suspend the operation of such charge * * * but not for a longer period than three months beyond the time when it would otherwise go into effect * * *. [Emphasis added.]

"The Commission did suspend the operation of such charges from June 1, 1968, to September 1, 1968--the full 3-month period allowed by section 204. In the Order released April 12, 1968 (FCC 68-388), we noted that '* * * users have been on notice since 1961 that TELPAK rates presented substantial questions of lawfulness * * * and that significant increases in these rates could result.'

"11. Furthermore, the Commission cannot reschedule the effectiveness of the September 1, 1968, increase in rates prior to completion of the hearing process, even if the Commission determines in due course that the increase itself is unlawful. Under section 205 of the act the Commission is authorized to prescribe 'just and reasonable charges' but only '* * * after full opportunity for hearing * * * the Commission shall be of opinion that any charge is or will be in violation of any of the provisions of this act * * *.' Thus, it is clear that we would contravene the express statutory language of section 205 if we were to attempt to modify as requested the schedule of charges timely filed by the carrier pursuant to section 203 of the act. [Footnote omitted.]

"12. Petitioners cite the decision of the U.S. Supreme Court in U.S. v. Southwestern Cable Co., _____ U.S. _____, 88 S. Ct. 1994 (1968 as

authority for the Commission's power to grant the relief requested under the general powers contained in sections 4(i) and 303(r) of the act, and quote extensively from the brief on behalf of the United States and FCC in that case. Suffice it to say that the specific and limited authority set forth in the act with respect to tariff filings delimits the Commission's power in this respect as opposed to the more general powers which were controlling in the Southwestern Cable case."

Thus the Commission has clearly and definitively ruled against the arguments which are once again being urged by Petitioners in this proceeding.*

40. AT&T has furnished detailed replies to these arguments in earlier pleadings. See the Opposition dated August 20, 1968 in Docket No. 18128, and the Opposition dated September 11, 1969, and Reply dated September 23, 1969 in connection with AT&T Transmittal No. 10563 (Television Transmission tariffs). Those replies are incorporated herein by reference, in lieu of repeating them here. As there shown, the cases involving other regulated enterprises, which Petitioners urge may be construed to enlarge this Commission's powers, are inapposite and afford no basis for a departure from the determinations reached by the Commission in its order cited above. The cases relied on by Petitioners fall into

* The Commission has also, in its legislative program for the current Congressional session, recognized the statutory limitations on its power to reject filed tariffs. See supra, page 17, first footnote.

two categories. On the one hand are cases in which a commission has, after a full hearing, prescribed rates or a rate level, and as a concomitant of that prescription, orders that no rate changes be filed for a prescribed period of time to permit orderly effectuation of a Commission policy. The Permian Basin Area Rate Cases, 390 U.S. 747 (1968), for example, falls in this category. On the other hand are the cases in which a commission is exercising its powers to condition the grant of a license or certificate of public convenience or necessity. In this category are, for example, Federal Power Comm'n v. Texaco, 377 U.S. 33 (1964); United Gas Improvement Co. v. Callery Properties, Inc., 382 U.S. 223, 338 (1965); and Federal Power Comm'n v. Hunt, 376 U.S. 515 (1964).

41. But the Commission is not here confronted with a situation in which rates have been prescribed, or in which the grant of a certificate is at issue. In the present circumstances the rules enunciated in United Gas Co. v. Memphis Light, Gas and Water Division, 358 U.S. 103 (1958) apply:

" . . . United, like the seller of an unregulated commodity, has the right in the first instance to change its rates as it will, unless it has undertaken by contract not to do so. The Act comes into play as to rate changes only in (1) imposing upon the seller the procedural requirement of filing timely notice of change, (2) giving the Commission authority to review

such changes, and (3) authorizing the Commission, in the case of rates for sales of gas for other than exclusively industrial use, to suspend the new rates for a five-month period and thereafter to require the posting of a refund bond pending a determination of the lawfulness of the rates as changed." (See § 4(d), (c), at note 3, supra.)

To the same effect, see Willmut Gas & Oil Co. v. Federal Power Comm'n, 294 F.2d 245 (D.C. Cir. 1961); cert. denied, 368 U.S. 975; rehearing denied, 369 U.S. 813.*

42. The Airlines argue (Airlines, para. 21) that "... the carrier has here contractually modified or circumscribed such authority as it might otherwise have to proffer tariff changes, by an agreement to which not only its customers but also the Common Carrier Bureau and the Commission itself are now parties." The reference is to the Docket No. 16258 Agreement, and the conclusion implied

* American Commercial Lines, Inc. et al. v. Louisville and Nashville Railroad et al., 392 U.S. 571 (1968) cited by Airlines (p. 47) and AIA (p. 19) and Amerada Petroleum Corp. v. F.P.C., 293 F.2d 372 (10th Cir. 1961), cited by AIA (p. 18) do not support the positions advanced by those Petitioners. In the former case the Supreme Court merely upheld the Interstate Commerce Commission's action in disallowing certain railroad rate reductions after full hearing. This case in no way enlarges the Commission's power to suspend rates without a hearing. The Amerada case involved the situation where a rate increase filing was made during the period when the rates increased were under suspension and not yet in effect and such filing was in direct disregard of a Commission rule prohibiting the filing of changes to rates under suspension. This case is not apposite here. For an analogous provision, see § 61.59(a) of this Commission's Rules.

is that AT&T's alleged failure to comply with that Agreement furnishes a basis for Commission action to defer the effectiveness of the TELPAK rate changes.

43. The same argument was made without success by the network broadcasters in their pleadings requesting rejection or extended deferral of the program transmission rates filed by AT&T Transmittal No. 10563. See Memorandum Opinion and Order adopted September 24, 1969 (FCC 69-1038). As shown above, AT&T has fully complied with both the specific terms and the spirit of the Agreement in Docket No. 16258. That Agreement did not contemplate that then existing rates would be maintained in effect. Indeed, as previously shown, the Agreement was made in express contemplation of the filing of rate changes by AT&T upon completion of the studies therein described. In any event, Petitioners do not show, nor could they show, how the Agreement in Docket No. 16258 could confer authority on the Commission to compel deferral of the effective date of the filed tariffs beyond the suspension period provided in § 204 of the Communications Act. The Agreement did not purport to, and could not, enlarge the authority of the Commission as provided by statute. On the contrary, the Agreement provides:

" . . . The effective date of any such rate level increase [i.e., carrier initiated] will

be subject to such authority as the Commission may possess. The parties do not agree as to the scope of the Commission's authority under various circumstances to reject, suspend or postpone the effectiveness of carrier initiated rates, and no party, by this agreement, waives its position on this question." (Procedural para. (3), 18 F.C.C.2d at 768.)

44. Thus, clearly the Communications Act cannot properly be construed as urged by Petitioners. There is no interstitial implied power to be derived from §§ 4(i), 303 (r), or 203 of the Act to nullify the express limitations of § 204 on the Commission's power to defer the effectiveness of carrier initiated rates.

* * * * *

45. AT&T respectfully submits that the foregoing amply demonstrates the invalidity of the Petitioners' contentions in support of the various forms of extraordinary relief requested and the lack of any sound basis for the grant of such relief or for any deferral of the effectiveness of the TELPAK rate revisions beyond that required to support an accounting order.

WHEREFORE, the Commission should deny all requests for deferment of the presently scheduled effective date of

the TELPAK rate revisions beyond the minimum period of suspension which is required to support an accounting order.

Respectfully submitted,
AMERICAN TELEPHONE AND TELEGRAPH COMPANY

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October 24, 1969

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of)

AMERICAN TELEPHONE AND TELEGRAPH)
COMPANY, LONG LINES DEPARTMENT)

) Transmittal No. 10609
) October 1, 1969
) 10-57-69

Revisions of Tariff F. C. C. No. 260, Pages)
1, 81, 84, 85, 86, Private Line Services)
Series 5000 (TELEPAK))

To: The Commission

REPLY OF AEROSPACE INDUSTRIES
ASSOCIATION OF AMERICA,
INC.

Aerospace Industries Association of America, Inc. ("AIA"),
by its attorneys, hereby submits this Reply to the Opposition filed by the
American Telephone and Telegraph Company ("AT&T") on October 24,
1969, to AIA's "Petition to Reject Further Telpak Rate Increases or
for Alternative Relief" and to various other petitions to reject, withdraw,
reschedule the effective date or suspend the Telpak rate increases now
scheduled to become effective on November 1, 1969, pursuant to AT&T
Transmittal No. 10609.

In support of this Reply, the following is shown:

1. The Petition of AIA and the petitions of various other
Telpak users referred to above may be summarized as contending, among
other things, that in the circumstances here presented a suspension for

no more than three months accompanied by an accounting order would be wholly inadequate to protect the users of Telpak from severe hardships and irreparable injury and ". . . would be extremely detrimental to the national security."^{1/} Those petitions contended that, on the other hand, appropriate Commission action staying the increases from going into effect pending a hearing and final decision on the legality of the existing and proposed Telpak rates would impose no comparable hardship or injury on AT&T, because the present Telpak rates are in fact compensatory and AT&T is earning a rate of return in excess of the appropriate range determined by the Commission in Phase I-B of Docket No. 16258. In these circumstances the petitioners argued that the Commission is authorized to take such action pursuant to Sections 4(i), 303(r) and 203(b) of the Communications Act of 1934, as amended. AIA further maintained that the Commission was, indeed, obligated to take such action, because, when Telpak rates were increased to their present (interim) level in 1968, the Commission indefinitely suspended the expedited and preferred hearing, otherwise guaranteed to the Telpak users by Section 204 of the Act, on the theory that the proceedings in Phase I-B of Docket No. 16258 and in Docket No. 17457 involved issues of "threshold essentiality" to a determination of the legality of the interim rates and that it had ordered

^{1/} Petition of the Secretary of Defense, p. 1.

both proceedings "expedited . . .";^{2/} however, Docket No. 16258 was subsequently closed out without resolving the issues there involved and Docket No. 17457 has not in fact been expedited; and that in these circumstances it would be arbitrary and capricious for the Commission not to use its powers under Sections 4(i), 303(r) and 203(b) to delay the new rate increases from becoming effective pending the completion of that hearing.^{3/} In addition, the petitions contended that, with respect to the presently proposed rate increases, AT&T did not follow the procedures to which it committed itself in the "Statement of Ratemaking Principles and Factors in Docket No. 16258, Phase 1-B" ("Agreement")^{4/} and that AT&T's cost studies supporting the Telpak rate increases are defective in such significant respects as to not comply with the Commission's Rules or the Agreement.

2. AT&T does, of course, take issue with some of the other contentions of the petitions, however, the linchpin of its position is simply this:

"Except for the power to suspend for three months available to it under §204 of the Communications Act, the Commission is without statutory authority, absent a full hearing, to order deferment of the effectiveness of a duly filed tariff beyond the 30-day notice period of §203."^{5/}

^{2/} 13 F. C. C. 2d 853, paras. 8-11 (1968); 14 F. C. C. 2d 564, para. 13 (1968).

^{3/} AIA Petition, paras. 7, 16-18, 22-24.

^{4/} 18 F. C. C. 2d 761, 765-769 (1969).

^{5/} AT&T Opposition, para. 38.

In plain English this contention means that however excessive, unjust or unreasonable a proposed rate increase may be and whatever injury it may inflict upon AT&T's customers, the public interest or the national security, absent a completed "full hearing," the Commission may do no more than prevent the increase from going into effect for approximately four months. Lest it be thought that this is an exaggeration of AT&T's position, note this:

"Section 204 provides that at any hearing involving a rate increase the burden of proof is on the carrier to establish the justness and reasonableness of the increase rate. This section imposes no burden of justification on the carrier at the time of filing a rate increase." ^{6/} (Emphasis in original)

3. This simple and unmovable "legal" position makes it possible for AT&T to brush aside as irrelevant -- or, indeed, brazenly to ignore -- any consideration, however publicly significant, which might justify action by the Commission delaying the effective date of the new Telpak rate increases for more than approximately four months.

4. Thus, a number of the petitioners demonstrated in detail why they would be irreparably injured if the Telpak rates should go into effect pending a hearing and why an accounting order would be wholly

^{6/} AT&T Opposition, para. 27.

inadequate to prevent or repair such injury.^{7/} AT&T does not deign even to attempt to answer their contentions. It merely notes that the statutory scheme provides for no more relief than an accounting order provides.^{8/} Similarly, AT&T takes the position that however defective its cost studies may be, a detailed review of them ". . . should not delay the effectiveness of the tariff provisions . . ."^{9/}; i.e., that no matter how blatantly defective the cost studies on which rate increases are based may be, the Commission must permit the increases to go into effect subject only to a subsequent hearing and an accounting order.

5. In the same spirit, AT&T does not deign to contest AIA's allegation that the present Telpak rates are compensatory.^{10/} Instead, it pontificates that: "A rate may be compensatory and still be subject to change."^{11/} And when the Airlines demonstrate that AT&T is earning in excess of the range of return determined in Phase 1-A of Docket No. 16258 and that the new Telpak rate increase will confer windfall profits upon it,^{12/} AT&T does not bother to make a denial. It merely states that what is a fair overall rate of return on the interstate activities of the Bell System will be considered elsewhere and ". . . is not relevant to the

^{7/} E.g., AIA Petition, paras. 37-40; Petition of Secretary of Defense, pp. 3-4; Petition of Airline Parties, paras. 58-60.

^{8/} AT&T Opposition, para. 33.

^{9/} AT&T Opposition, paras. 14, 16.

^{10/} AIA Petition, paras. 25-26.

^{11/} AT&T Opposition, para. 36.

^{12/} Airline Parties Petition, paras. 7-8.

issues before the Commission by reason of the present TELPAK rate filing.^{13/} Obviously the foregoing matters were raised by the AIA and the Airlines to show that AT&T would suffer far less significantly if the Commission should delay the effective date of the Telpak rate increases beyond a period of approximately four months than would the Telpak users if the increases should be permitted to go into effect during or at the end of that four-month period. AT&T's summary dismissal of these considerations is only possible because of its theory that injury to its customers, to the public interest and to the national security are wholly irrelevant; that once AT&T files a rate increase the Commission's power to delay the effectiveness of the increase are limited to the approximately four months provided for in Section 204.

6. While AT&T's treatment of the foregoing contentions of AIA and the Airlines was at best back-of-the-hand, at least AT&T deigned to recognize the fact that the contentions were made. However, it did not even extend that minor courtesy to the representative of the United States as a user. The Secretary of Defense filed a petition to reject or require withdrawal of the rate increases "on behalf of all Executive Agencies of the United States." That petition pointed out, among other things, that the "Executive Agencies do not have the funds available to meet the

^{13/} AT&T Opposition, para. 37 (Emphasis supplied)

\$44,313,500 annual increase" here involved for them, that an accounting order is "no help whatsoever" in the situation and that huge termination liabilities are involved for the Government, as well as drastic cut-backs or decreases in service; all of which would "be extremely detrimental to the national security."^{14/} Yet in its Opposition AT&T wholly ignores the Secretary and his Petition. Except for inclusion of that Petition in an enumeration of pleadings filed in this proceeding, the Opposition makes no mention whatsoever of that Petition or its allegations! AT&T's theory, therefore, seems to be that when it files a rate increase, the effect is like the issuance of an imperial ukase in the ancien regime: it makes no difference who or what is injured or how urgent or unreasonable the consequences; an inexorable process has been initiated which no one other than AT&T, itself, can halt.

7. And it is not merely its customers, the Secretary of Defense and the Executive Agencies of the United States, which AT&T ignores. With respect to its essential legal position AT&T ignores the Federal Communications Commission as well. On October 17, 1969, (seven days before AT&T filed its Opposition in this proceeding) the Commission released a Notice of Proposed Rule Making relating to the amendment of Part 61 of its Rules (FCC 69-1140; Docket No. 18703).

^{14/} Petition of the Secretary of Defense, pp 3-5.

Among other amendments, the Commission now proposes to modify 47 C.F.R. §61.58 to require sixty days' notice (including filing) of tariff changes effectuating rate increases, rather than the thirty days now required by that Rule. This proposed action would constitute a clear and absolute contradiction of the position of AT&T, quoted above, that ". . . the Commission is without statutory authority, absent a full hearing, to order deferment of the effectiveness of a duly filed tariff beyond the 30-day notice period of 5203." Yet AT&T's Opposition does not mention -- wholly fails to recognize -- the existence of the Notice of Rule Making!

8. AT&T's position should be contrasted with the Commission's statement when it issued the Notice:

" . . . Generally, the Commission is restricted by Section 204 of the Communications Act to a suspension period of 3 months before a properly filed tariff becomes effective. This coupled with the present 30 days notice requirement contained in the Rules and Regulations (47 C F R 61.58) allows the Commission only approximately four months to evaluate, if necessary suspend and investigate, go through hearings, and reach a decision on the lawfulness of a tariff. Because of the inadequacy of the information given by the carriers pursuant to the existing tariff provision, and the time necessary to get adequate information, the 4 months period has become totally inadequate In addition to a better information base, we propose to increase the notice requirement for tariff changes that constitute a rate increase from the present 30 days statutory notice to 60 days. Section 203(c) [sic, 203(b)] of the Act permits the Commission in its discretion, when good cause is shown, to modify the statutory notice requirement by a general order applicable to special circumstances or conditions. For the foregoing

reasonings, we believe that such a modification is imperative if the Commission is to have enough time to perform its statutory duties."
(FCC 69-1140, para. 6; emphasis supplied)

Significantly, the Notice states that "Generally"^{15/} the Commission is restricted by Section 204 to a three-month suspension period. In addition, it concludes that a modification of the thirty-day notice provision provided for in the present Rules and (subject to modification) in Section 203(b) of the Act "is imperative" and finds authority to do so in the very sections of the Act invoked by the petitioners when they first requested relief -- Sections 4(i) and 203(b).^{16/}

9. Two conclusions may appropriately be drawn from the language quoted above and the Commission's proposed rule changes. First, AT&T's views as to the legal restrictions on the Commission's power to prevent a rate increase from becoming effective are without merit. Indeed, if the proposed amendment of 47 C F R 61.58 were in effect now, the proposed Telpak rate increase would, at a minimum, be deferred for thirty days beyond the period AT&T contends is legally permissible. Second, once it is concluded that the thirty-day notice provision of Section 203(b) and the three month suspension period are not immutable

^{15/} The clear implication of the word "Generally" is that, in appropriate circumstances, the Commission is not so restricted by Section 204. In consequence, if 14 FCC 2d 564 (1968), on which AT&T relies in its Opposition (para. 38), held otherwise, it is modified by FCC 69-1140.

^{16/} FCC 69-1140, para. 10.

limitations, it must also be recognized that Sections 4(i) and 203(b) empower, indeed require, the Commission to respond effectively to the situation here presented. Section 203(b) does not limit the Commission to proceeding by general regulation. It also expressly authorizes the Commission to modify, i. e., to extend, the thirty-day notice requirement relating to changes in charges ". . . in particular instances" It is submitted that, as required by Section 203(b), "good cause"^{17/} has been shown for the Commission to take appropriate action which would prevent the pending Telpak rates from becoming effective until after conclusion of a hearing and the entry by the Commission of a final decision as to the legality of the present and proposed Telpak rates. Indeed, in the light of the good cause shown and the failure of AT&T even to attempt to controvert many of the most significant allegations^{18/} evidencing such "good cause," the failure to grant the requested relief would constitute an abuse of discretion.

10. It is submitted that the foregoing demonstrates that the basic ground for AT&T's opposition to grant of the relief requested in AIA's Petition and in similar petitions is legally erroneous and ignores

^{17/} E. g., the lack of hearing as to the legality of the present rates, AT&T's tacit admission that the present rates are compensatory, AT&T's rate of return, the impact on the national defense, the extreme hardship on users, the ineffectiveness of an accounting order, etc.

^{18/} E. g., impact on national security, compensatory nature of existing rates, AT&T's rate of return, the inadequacy of an accounting order.

the basic legal, equitable, economic and public interest considerations involved. Accordingly, irrespective of any additional arguments made by AT&T, the relief requested in those petitions should be granted.

However, in its Opposition, AT&T does make certain additional allegations which are either inaccurate or the implications of which are misleading. They should not be permitted to stand without correction.

11. AT&T places great stress in its Opposition on the fact that, ". . . as contemplated by the Agreement, Bell System representatives have worked closely with the Commission staff . . ."; that its decision to ignore recommended changes in the sharing regulations ". . . was arrived at after discussion with the Common Carrier Bureau staff. . ."; and that its treatment of depreciation in the studies ". . . benefited from numerous discussions with interested users and the Common Carrier Bureau staff."^{19/} In addition, AT&T contends that ". . . the Commission itself has indicated that it expected and desired rate adjustments for services such as TELPAK. . ." by October 1, 1969, and ". . . that with respect to TELPAK adjustments, the lawfulness of such filings would be resolved in Docket No. 18128"^{20/} The implication is that AT&T, the Commission and, perhaps, certain Telpak users, agreed that if AT&T made certain cost studies which it would discuss with the Commission

^{19/} AT&T Opposition, paras. 10, 19, 24.

^{20/} AT&T Opposition, para. 5.

staff, increases in Telpak rates could be filed on or about October 1, 1969, and would be permitted to go into effect subject to a subsequent hearing as to their lawfulness. Of course, AIA was never a party to any such agreement and if it exists it cannot be binding on it. Moreover, whatever attempts at informal cooperation the Commission or its staff made, such efforts could not validly result in limiting the exercise of the Commission's statutory authority and discretion in the light of the pleadings submitted after Transmittal No. 10609 was filed. Accordingly, the discussion which representatives of AT&T had with the Common Carrier Bureau staff or the Commission's expectations are wholly irrelevant to the issue now before the Commission.

12. AT&T does not deny the contention made by AIA and Bethlehem Steel Co. and various other large Telpak users that they are "interested persons" within the meaning of the Agreement; that, as such, they were entitled under paragraph 11 to an opportunity to express their views with respect to the cost study methodology; but that, in fact, they were afforded no such opportunity.^{21/} The obvious conclusion is that AT&T violated the Agreement. However, it argues that AIA and the other Telpak users were ". . . aware of what was occurring, they refrained from participating This argument by AIA and Bethlehem should be

^{21/} AT&T Opposition, para. 15.

summarily rejected." ^{22/} First, the implication that interested persons or their representatives, who were not parties to Docket No. 16258 were permitted freely to participate in discussions which preceded the instant Telpak rate increases is simply incorrect. For example, in response to his request, counsel for AIA was advised by Commission staff that he could not be present at the proceedings which led to the Agreement itself. Second, paragraph 8 of the Agreement expressly states that "interested persons," such as AIA and Bethlehem, would be ". . . afforded a timely opportunity to express their views . . ." concerning study methods "[b]y such formal or informal procedures as the Commission deems appropriate" In these circumstances it was wholly proper for "interested persons" to await Commission action indicating that it had determined some particular "formal or informal procedure" to constitute the appropriate method by which their views should be expressed.

13. In further response to contentions that interested persons were not consulted, AT&T argues that ". . . it was reasonable and prudent to omit customer inquiries in the interest of obtaining unbiased results . . ." in its marketing studies ". . . because customer responses to any marketing questionnaire would obviously be conditioned by their knowledge of the effect which such responses could have on study results" ^{23/}

^{22/} AT&T Opposition, para. 15.

^{23/} AT&T Opposition, para. 20.

The assumption that its customers will lie, but that AT&T's employees are not subject to any "bias" is as questionable as it is unpleasant. In addition, that assumption led to an arrogant and unsupportable course of action. As the Secretary of Defense pointed out: "The Executive Agencies of the United States are by far the largest users of Telpak service in the United States." Their current yearly charges exceed \$105,000,000.^{24/} Yet AT&T's ". . . communications service projections for the Federal Government . . . [were made] without consulting the Federal Government as to accuracy or as to future plans and requirements."^{25/} Even the Federal Government was not to be trusted!

WHEREFORE, the premises considered, Aerospace Industries Association of America, Inc., respectfully prays that the Commission promptly reject or stay, as requested in its Petition filed October 10, 1969, the effectiveness of the increases in rates and charges for Telpak (Series 5000), Tariff F.C.C. No. 260, as proposed pursuant to Transmittal No. 10609 of the American Telephone and Telegraph Company, dated

^{24/} Petition of Secretary of Defense, p. 1.

^{25/} Id., p. 3.

October 1, 1969, and that the Commission grant such further relief as may be just and proper. In view of the urgent nature of the matter and the irreparable injury which will otherwise be caused to AT&T's customers and to the public interest, AIA further prays that if the Commission has any doubts as to its power to grant, or the propriety of granting, the relief here requested, prompt oral argument before the Commission en banc is requested.

Respectfully submitted,

AEROSPACE INDUSTRIES ASSOCIATION
OF AMERICA, INC.

By /s/ Arthur Scheiner
Arthur Scheiner

/s/ Harold F. Reis
Harold F. Reis

Its Attorneys

OF COUNSEL:

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1343 H Street, N. W.
Washington, D. C. 20005

October 27, 1969

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 69-1196
38692

34 F.R. 18142
11/11/69

In the Matter of)
)
American Telephone and Telegraph)
Company)
Long Lines Department)
Revisions of Tariff F.C.C. No. 260,)
Private Line Services, Series 5000)
(Telpak))

DOCKET NO. 18128

MEMORANDUM OPINION AND ORDER

Adopted: October 29, 1969 ; Released: November 6, 1969

By the Commission: Commissioner Robert E. Lee absent; Commissioner Cox issuing a separate statement; Commissioner Johnson dissenting and issuing a statement.

1. The Commission has before it for consideration proposed revisions to F.C.C. Tariff No. 260, filed by the American Telephone and Telegraph Company (AT&T) (1) on March 28 and August 29, 1969, for a new offering, titled Series 11,000, to become effective November 1, 1969, 1/ and (2) on October 1, 1969, in the Telpak tariff to be effective November 1, 1969. Petitions to suspend the Series 11,000 offering were filed June 16 and 17, 1969, by Microwave Communications Inc. (MCI) and The Western Union Telegraph Company (Western Union). 2/ A petition to reject this offering was also filed by MCI. After the August 29, 1969, filing by AT&T, MCI filed a supplement to complaint and petition for rejection and/or suspension. Replies to the aforementioned pleadings were filed by AT&T. 3/ Western Union has submitted no comments as to the revised schedules filed August 29, 1969. Petitions to reject, or require or secure withdrawal of further Telpak increases or other relief were filed by Air Transport Association of America (ATA), Aeronautical Radio, Inc. (ARINC), United Air Lines, Inc. (United), Eastern Air Lines, Inc. (Eastern), Emery Air Freight Corporation (Emery), Aerospace Industries Association of America, Inc. (AIA), the Secretary of Defense on behalf of all Executive agencies of the United States (Secretary of Defense), Associated Press (AP), Bethlehem Steel Corporation (Bethlehem), E.I. duPont de Nemours and

1/ AT&T extended the effective date of the revised schedules from July 1, to October 1, 1969, then to November 1, 1969.

2/ Western Union, pursuant to Section 1.773, sent a telegraphic request for suspension on June 16, 1969.

3/ Comments were also filed concerning the filing by Air Transport Association of America and Aeronautical Radio Inc.

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Company (duPont), Ford Motor Company (Ford), Monsanto Company (Monsanto), Olin Corporation (Olin), Republic Steel Corporation (Republic), Union Carbide Corporation (Union Carbide), United States Steel Corporation (U.S. Steel), Westinghouse Electric Corporation (Westinghouse), and Chicago, Rock Island and Pacific Railroad Company. 4/

2. The proposed filing titled Series 11,000 is intended to provide high capacity wideband channels on a discrete spectrum basis which can be arranged by AT&T for a variety of wideband uses or for individual voice grade channels. Major features alleged are that (1) the proposed service will be furnished only over AT&T's coaxial and high capacity microwave routes, and that pricing is related to the low unit costs of such facilities; (2) provisions in the tariff will permit joint users to share in the base capacity of the wideband channels; and (3) provision of a continuous wideband spectrum will accommodate a combination of wideband data and voice grade arrangements as requested by the customer. The proposed offering is experimental in nature, limited to a term of three years to expire November 1, 1972, and to specific routes to ascertain market potential, effect on other services, joint use provisions, pricing structure, and rearrangement implications of a discrete spectrum offering.

3. MCI, in its Petition to Suspend, alleges generally that the proposed offering is (a) a revival of the illegal Telpak A, (b) that the revised tariff schedules are duplicative, at cut rates, of existing private line services for a few of the users and that (c) in general, it is an anticompetitive move without the slightest public benefit or need. Western Union in its petition requests that the Commission request AT&T to voluntarily suspend the proposed revision or in the alternative order its suspension. Basically, Western Union alleges (1) that the rates for the Series 11,000 are unreasonable, (2) that the titling of the service as experimental is a ploy since its design and structure precludes the assembly of meaningful data, and (3) that the proposed revisions are unduly complicated and ambiguous further confusing the present conglomeration of private line services.

4. MCI's petition for rejection of tariff alleges that the proposed filing for the Series 11,000 is in contravention of Section 61.55 of the Rules requiring clarity of tariffs and that additional Section 214 authority is required to effectuate the proposal. The revised schedules filed August 29, 1969, remove substantially the complexities and ambiguities previously noted in this filing. To the extent that ambiguities may continue to exist they appear to be of a

4/ AT&T filed an opposition to the petitions and AIA filed a reply to the opposition.

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minor nature. We need not decide at this time whether additional Section 214 authority or radio licenses will be necessary for this service and will defer action on the question pending development of facts on the hearing record herein.

5. The trial service, Series 11,000, differs from Telpak and the other private line services in that, (1) the service is experimental, offered only in a specified area for a limited time, (2) the new service is a two point service only and not multipoint, (3) the new service is offered only over certain designated high capacity physical routes of the telephone company, (4) the individual data or voice channel derived in the new service from the wideband facility will be furnished only from such physical facility and will not be furnished over diverse routes and (5) the unlimited sharing provisions in Series 11,000 relate to the sharing of a discrete physical facility rather than a theoretical pricing concept.

6. By Order adopted July 11, 1968, and released July 16, 1968 (FCC 68-711), the Commission instituted an investigation and hearing into the lawfulness of charges by AT&T for private line services in general (other than program transmission). The investigation of AT&T's Telpak rates ordered in the April 12, 1968, Order (FCC 68-366) was included in the private line investigation. By Order adopted July 24, 1968, and released July 29, 1968, the Commission included in the hearing and investigation in Docket No. 18128, the schedules of Western Union in its Tariff F.C.C. No. 237 and specified that the issues heretofore specified in that docket shall apply with equal force to the tariff schedules of Western Union.

7. Although there appear to be differences between the new experimental wideband, shared service offering, on the one hand, and existing Telpak and other private line services, on the other hand, we are unable to determine at this time whether any such differences warrant the differences in charges proposed in the new offering. Moreover, we cannot conclude at this time that the charges proposed for the new service designed to recover calculated full additional costs plus 20% thereof, will be just and reasonable and otherwise lawful. Accordingly, we believe that these questions should be examined in the context of our private line investigation. No useful purpose will be served, however, by suspending inauguration of the experiment for a period of three months, and therefore we will permit the Series 11,000 offering to become effective as filed.

8. We wish to emphasize that all customers of this experimental service are on notice that this service is a trial for a limited period

of time and that the lawfulness thereof is yet to be determined.' Therefore, any subscriber to this service is forewarned that use of the service will not constitute any equitable or other basis for continuance of the service in the future.

9. The revisions to the Telpak (Series 5000) tariff propose an increase in rates for the Telpak C and D base capacities, a change from 6 (3 in the case of 150 baud service) to 2 in the number of telegraph channels and an increase in rates for certain service terminals. AT&T alleges that the increase in rate levels will improve the revenue cost relationship of Telpak and increase the contribution of that service to overall earnings. For its justification of such substantial increases, AT&T relies upon studies recently completed in recognition of the Statement on Ratemaking Principles and Factors in Docket No. 16258, Phase 1-B (Appendix A of the Commission's Memorandum Opinion and Order adopted July 29, 1969, 18 F.C.C. 2d 761, 765). The petitioners filing against the Telpak increases allege generally (1) that the instant rate increases violate the Statement of Ratemaking Principles and Factors in Docket No. 16258, Phase 1-B, (2) that the tariff increases are patently improper and involved, and that (3) suspension and investigation of these tariffs, together with an accounting order, are inadequate remedies and that extraordinary relief is necessary. We cannot agree with the petitioners' construction of the Statement of Ratemaking Principles and Factors in Docket No. 16258, Phase 1-B (agreement), FCC 69-842, 18 FCC 2d. 761 (1969). We made it abundantly clear in our Memorandum Opinion and Order that we were not necessarily approving the stipulation, merely noting it. Of equal concern, is the petitioners' reliance upon their alleged contractual rights pursuant to the agreement. A careful reading of the agreement denotes an accord as to certain ratemaking principles and factors embodied in this agreement. We fail to find any contractual rights and obligations flowing to, from, or between the parties involved, nor indeed, do we discover the use of any terminology which would imply the establishment of such rights and obligations. This is not to suggest that we would not be concerned if any of the parties departed substantially from the import of this accord. We are merely stating that the agreement per se does not establish substantive rights and obligations which, if not observed, can be viewed as a breach of contract. The parties who allege certain departures from the accord may raise questions in Docket No. 18128 with respect thereto. The revised tariff schedules for Telpak, while raising questions that may be explored in hearing, can not be construed as being so defective as to require rejection. The interested parties will have ample opportunity during the proceeding in Docket No. 18128 to explore those areas in which they express concern and to develop their position on the record.

10. We now address ourselves to petitioners' requests for extraordinary relief and oral argument. We fail to perceive in petitioners'

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extraordinary circumstances that would require the extraordinary remedy, or any benefit that would accrue at this point, by granting the relief sought for oral argument. We have previously res-
 pected the attention that we possess plenary power pursuant to Section 4(1), and 203(r) of the Communications Act of 1934, as amended, to accord the requested relief, in our Order adopted August 28, 1964, 2 FCC 2d 554, and find no reason to disturb our conclusion reached therein. As to petitioners' conclusion that Section 203(b) of the Communications Act of 1934, as amended, conveys sufficient authority to suspend the effective date of the proposed tariff revisions in Telpak, we decline to say that we find no necessity for the imposition of such extraordinary relief. However, we are not deciding at this time the extent of our authority to grant the kind of relief petitioners' request.

14. On the basis of the information now before us, we are unable to determine that the charges, classifications, regulations and practices contained in the Telpak revised schedules are or will be just and reasonable or otherwise lawful. As noted in Paragraph 6 above, we have instituted an investigation and hearing into the lawfulness of charges by AT&T for private line services in general, including Telpak, other than program transmission services. This covers any amendments, cancellations or successive issues thereof effected during the pendency of the investigation. In Docket No. 18128, including the revisions to Telpak presently before us.

15. We now come to the question of whether we should suspend the Telpak revised schedules for a portion or all of the statutory period. At this point it is well to dwell briefly upon the history of the Telpak offering. These rates were filed in 1961, principally to meet the threat of competition from private microwave systems which had arisen as the result of the Commission's decision in the Above 890 Mc case. Telpak rates were originally offered in four classifications, A, B, C and D, based on the number of channels required between a given pair of points. After extensive hearings, the Commission found the A and B classifications, which encompassed the lesser number of channels, to be unduly discriminatory since they applied to a service similar to private line service but afforded different rates for such service. The justification of competitive necessity was found not to be applicable to the A and B classifications, since it would not be practical for a customer to construct his own microwave system if his need was limited to the number of channels encompassed by these classifications. The Commission found, however, that there was apparent competitive necessity for the C and D classifications which encompassed larger capacities, but required a further showing on the question of whether

the existing rates for such classifications were compensatory. In accordance with our decision in the original Telpak case, Telpak A and B were cancelled. Upon such cancellation, the proceeding was terminated and the question as to whether Telpak C and D were compensatory was placed at issue in Docket No. 16258, and subsequently incorporated into Docket No. 18128. It must be kept in mind that Telpak classifications C and D were found to be discriminatory and that we were unable to find the rates for such services compensatory. This question is still posed and the lawfulness of the revised tariff schedules presently before us will be resolved upon the record made in Docket No. 18128. We are cognizant of the fact that the intervenors in Docket No. 16258 have not yet had the opportunity to present their cases which presumably would seek to establish that the original rates were compensatory and that competitive necessity requires their maintenance at the present level. The revised tariff schedules for Telpak presently before us propose substantial increases as did the presently existing tariff schedules which became effective approximately a year ago. In view of the substantial increases the company now proposes, we feel compelled to exercise the extent of our statutory authority and suspend for three months the proposed tariff schedules for Telpak. Moreover, we are issuing an accounting order as to the contemplated increases to protect the interests of the parties involved. We note that some parties have expressed concern about the effectiveness of the accounting orders, but see no merit in these contentions. The carriers and interested parties are again put on notice that the Telpak increases effective September 1, 1968 and which will continue to February 1, 1970, are subject to an accounting order and that if after completion of this hearing, the Commission issues an order refunding charges paid during this period, the accounting procedures should be sufficiently accurate to ensure all customers are recompensed. Similar action should also be accorded the accounting to be required for the proposed tariffs presently before us.

13. The Commission in its Memorandum Opinion and Order of July 16, 1968, 13 F.C.C. 2d 853, deferred proceedings in Docket No. 18128 pending a determination with respect to the proceedings in Phase 1-B of Docket No. 16258 and the Telpak Sharing case, Docket No. 17457. Since that time, the Chief, Common Carrier Bureau, has issued a Recommended Decision in Docket No. 17457, which is now pending before us. Furthermore, the parties in Phase 1-B of Docket No. 16258 have entered into an agreement as to ratemaking principles and factors looking toward determining that phase (see 15 F.C.C. 2d 761, 765). We also note that the cost studies submitted by AT&T in support of the proposed Telpak revisions assume a continuation of the sharing provisions as now in effect. Under such circumstances, we will no longer defer the proceedings in Docket No. 18128, and the examiner presiding in that case is authorized to schedule hearings therein at such time as he may deem appropriate.

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14. Accordingly, IT IS ORDERED, That pursuant to Sections 201, 202, 204, 205 and 403 of the Communications Act of 1934, as amended, the hearing and investigation in Docket No. 18128 concerning the lawfulness of the private line tariff schedules of American Telephone and Telegraph Company shall include the like revisions to AT&T Tariff F.C.C. No. 260 forwarded with Transmittal Nos. 10396 and 10562 filed on March 28 and August 29, 1969, and Transmittal No. 10609 filed on October 1, 1969, as enumerated in the Appendices hereto, and that the issues heretofore specified in that docket shall apply with equal force to the above-described revised tariff schedules of AT&T.

15. IT IS FURTHER ORDERED, That pursuant to Section 204 of the Communications Act of 1934, as amended, the operation of the tariff schedules listed in Appendix B as becoming effective November 1, 1969, IS HEREBY SUSPENDED, unless otherwise ordered by the Commission, until February 1, 1970, and that during said period of suspension, no charges shall be made in said tariff schedules or in the charges sought to be altered thereby unless authorized by special permission of the Commission and that Respondents, as to the operation of such tariff schedules, shall, in the case of all increased charges and until further order of the Commission, keep accurate account of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and upon completion of the hearing and decision therein, the Commission may by further order require the refund thereof, with interest, pursuant to Section 205 of the Act, and the carrier shall file with the Commission a report on or before the 10th day of each month, commencing March 10, 1970, showing the amounts accounted for as aforesaid during the previous calendar month.

16. IT IS FURTHER ORDERED, That the petitions for rejection, suspension, withdrawal, or other relief ARE GRANTED to the extent noted and otherwise DENIED;

17. IT IS FURTHER ORDERED, That all parties named in paragraph 1, supra, as having filed petitions for relief ARE GRANTED leave to intervene upon filing a notice of intention to appear and participate within 20 days of the release date of this order.

FEDERAL COMMUNICATIONS COMMISSION*

Ben F. Waple
Ben F. Waple
Secretary

Attachment - Appendix

* See attached Separate Statement of Commissioner Kenneth A. Cox and Dissenting Statement of Commissioner Nicholas Johnson.

SEPARATE STATEMENT OF COMMISSIONER KENNETH A. COX

I concur generally in this action, but dissent to the suspension of the tariff for ninety days. In view of the long delay in correcting the discriminatory TELPAK rates, I would suspend the new tariff for only one day, or until the company files tariffs covering the off-setting reductions in message toll telephone rates which are to be made.

Series 11,000--Telpak

[In the Matter of American Telephone and Telegraph . . . Telpak]

Dissenting Opinion of Commissioner Nicholas Johnson

The Commission here makes two decisions affecting private line communications service offered by Bell Telephone. Neither decision will serve the public interest.

Bell seeks to raise its Telpak rates believing them to be too low. Numerous powerful user groups have protested. Telpak is the service which the Commission has believed could be noncompensatory, that is, its rates do not compensate Bell for its costs and are designed to meet competition from private carriers. Even Bell's studies show a need to raise these rates. The new Telpak tariffs are filed in part as a result of negotiations held in the overall rate investigation (Dkt. No. 16258).

Unfortunately neither the Commission nor Bell is now prepared to institute lower rates for the MTT service (the common man's "message toll telephone" long distance service) to offset the Telpak increases, despite longstanding promises by the company that the two events would occur simultaneously. Thus, the majority's action today simply acquiesces in Bell's brazen refusal to provide the small user with the much needed and long-overdue rate reductions to which he is entitled.

The Commission is going to suspend the new Telpak rates for the maximum period allowed by law--90 days. For the purposes of a hearing and accounting order a one-day suspension would serve as well. Large users of communications services will thus have the effect of the rate increases postponed--despite the fact that Telpak users have been on notice for eight years that the Telpak rates may be noncompensatory and for months that rate increases were coming! Allowing suspension for the full 90 day period serves no equitable purpose; it is simply another example of what Fred Friendly has called "the leaning tower of jello" bending in response to the political and business winds.

It is useful to note the majority's discussion at paragraph 9 of its order. I have outlined in another opinion the defects with the Commission decision in Phase 1B of Dkt. No. 16258. [A. T. & T. Co., 18 F. C. C.2d 761, 769 (1969)] The majority's discussion here confirms not only the hopeless ambiguity of the so-called "stipulation" but also demonstrates that resolution of questions regarding pricing policy and price discrimination are no farther along now than they were in 1965 when the overall rate investigation--Dkt. No. 16258--was begun to deal with them.

The majority's almost unseen reaction to the Bell shell-and-pea game represented in the new "Series 11,000" tariffs is even more serious

than the failure to provide some price decreases to the general consumer. Since the inception of the Telpak service in 1961 the Commission has been concerned that Bell was offering discriminatory services designed to drive out or prevent competition in the private line field. The majority recites the history of Telpak at paragraph 12 of its order. Much of the Commission's regulatory activity toward Bell has grown out of this concern. And as the majority points out in paragraph 12, the lawfulness of the original Telpak offerings is still in question.

Incredibly, the majority today allows Bell to institute a new private line tariff classification (called Series 11,000) designed as a replacement for Telpak--a special tariff presumably designed to head off threatened competition.

ATT has advised the Commission that Series 11,000 is designed principally to serve as a potential substitute for the discriminatory Telpak rate classification in the event that the Commission should require ATT to permit unlimited sharing of private line service under the Telpak rate classification. Thus, Series 11,000 could negate the effect of possible Commission decisions relating to the Telpak sharing provisions (Bell has indicated Telpak would probably be terminated if sharing is required) and the compensatory level of Telpak rates, by substituting a new discriminatory service for an old one. The majority

dumps the question of lawfulness of Series 11,000 into a proceeding already overcrowded with Telpak matters (all the unresolved Telpak and private line lawfulness questions plus the two Telpak rate increases--Dkt. No. 18128). The result is that any unlawful competitive effect of Series 11,000 will take place long before the Commission can decide the question of its lawfulness.

One need only examine the majority's description of the Series 11,000 service to find evidence that it is intended to forestall competition. Series 11,000 is planned for only the northeast and central United States, including Illinois, an area where the Commission has several applications for competitive non-Bell private line services. Series 11,000 is for high capacity routes only, the type of routes which Bell's competitors seek to serve. Series 11,000 is to be provided only over Bell's lowest cost interexchange facilities. Series 11,000 is designed for data--and the competing proposals are designed for data. Series 11,000 is a two-point rather than multipoint service--and the competing proposals are for two-point service. Series 11,000 would allow unlimited sharing, as would the competing proposals. Finally, Series 11,000 would be priced in accordance with the principles Bell urged in the overall rate hearing--principles still to be evaluated by the Commission. Needless to say, use of these pricing principles

allows Bell to charge a low price for Series 11,000. In sum, to use Bell terminology, Bell is "creamskimming" its own market in terms of its selection of locations and facilities for providing service. Here is yet another example of Mason Williams' famous adage that "Government makes better deals with business than it does with people." Presumably the general public is again to be relegated to the leftovers of Bell's service.

In light of these "coincidences," the Commission would be fully warranted in establishing a special, expedited proceeding to test the lawfulness of Series 11,000. Outright rejection of the 11,000 tariff may not now be advisable, although Bell has not answered many of the questions the staff asked when the tariff was first filed. But to allow the delay that will result from consolidating Series 11,000 in a proceeding where a decision will not come for years is simply to grant Bell carte blanche to price as it wishes.

Bell is entitled to a speedy answer as to the lawfulness of this "experimental" offering. So are Bell's customers. And potential competitors of Bell who well might be victims of destructive competition are also entitled to know whether the Commission will establish and protect a fair competitive environment in those situations where a monopoly seeks to serve markets for which there are active competitors. There will be no timely answers for Series 11,000.

An expedited, separate proceeding could focus immediately on the

question of Series 11,000's possible discriminatory effect. The Commission could also compel ATT to furnish copies of internal company documents that deal with the company's intentions and expectations about the competitive effect of this service.

Perhaps the Commission is incapable of regulating Bell's pricing practices effectively. Its present consolidated proceeding now includes the past lawfulness of Telpak, one rate increase piled on top of another already suspended, and Series 11,000. The delay which has characterized Commission proceedings on competition and pricing policy serve only the purposes of ATT and their large users who may receive discriminatorily low rates. But at least the Commission could be candid about it. No one should be misled by today's actions. The Commission is not about to resolve the really difficult regulatory problems it now faces in the common carrier field.

PUBLIC NOTICE

Federal Communications Commission = 1918 M Street, NW. = Washington, D.C. 20554



FCC 69-1210
38859

November 5, 1969 - G

RATES FOR INTERSTATE LONG DISTANCE CALLS TO BE REDUCED*

Reductions in rates for interstate long distance telephone calls will be submitted shortly by the Bell System telephone companies to the Federal Communications Commission. It is expected that the reduced rates will save users of telephone service about \$150 million per year. In addition, AT&T has previously agreed to file reductions of about \$87 million representing an offset to increases in revenues resulting from higher rates recently filed for program transmission, Telpak and teletypewriter exchange (TWX) services when the latter increases become effective. The Commission anticipates that the new rates will permit the companies to achieve earnings in a range needed to attract capital under today's conditions.

The proposed reductions are being submitted by AT&T in connection with the comprehensive review recently completed by the FCC of the Bell System's interstate operations and earnings requirements. The review was conducted as part of the Commission's continuing surveillance of the Bell System's interstate operations, and was participated in by representatives of the Commission's staff, Bell System officials, and several outside consultants who are expert in economics and finance.

The proposed rate reductions take account of the material increases in AT&T's cost of capital. At the same time, they recognize that the growth in interstate traffic is continuing unabated; that the average revenue per message has shown steady increase since the reductions required by our 1967 decision took place; and that the interstate earnings of the Company have consistently grown despite the increases in its costs due to the inflationary spiral. In 1969, interstate earnings are expected to exceed 8%. We fully expect that the growth trends in traffic, revenues, and earnings will continue. This expectation is substantiated by AT&T's own forecast of interstate operating results for 1970, which ranges, under present rates, to levels above 8.5%, depending on economic conditions. Consistent with experience following prior rate reductions, we also anticipate that the interstate revenues and earnings will be stimulated to some extent by the reductions in rates the Company is now proposing. Thus, it is anticipated that the rate adjustments announced today will not, in themselves, prevent the Company from achieving earnings in the aforementioned range. The Commission will maintain a continuing surveillance and take such action as is appropriate in the light of future conditions.

(over)

The Commission initiated the current review in light of the sustained growth in the interstate earnings of the Bell System to levels well in excess of the level determined by the Commission to be adequate and reasonable in its 1967 decisions. In conducting the current review, the Commission examined the Company's present and anticipated capital needs and the levels of, and trends in, its revenues, expenses and earnings. The Commission focused on AT&T's cost, under current economic conditions, of attracting the large amounts of new capital, estimated at more than \$200 million a month, required by AT&T for its ever-increasing construction program to meet new and expanding needs of the public for communication services.

The examination was made by the Commission within the framework of the principles and standards it formulated in its decisions issued in July and September 1967, following a comprehensive formal investigation and hearing into the Bell System's interstate rates (Docket 16258). In those decisions, the Commission concluded, among other things, that a return in the range of 7.0% to 7.5% was fair and reasonable at that time for purposes of effecting adjustments in AT&T's interstate rates. It also stated that it did not regard this range as establishing an absolute floor or ceiling for future earnings. Instead, it said it would, when there were departures from this range, consider the matter in light of conditions obtaining at that time.

In keeping with those principles, the Commission is of the view, in the light of current conditions, and with due regard to the proposed reductions, that interstate rates producing an earnings level which exceeds the upper limit of the 1967 range (7.5%), are not unreasonable. The Commission based this view on the changes which have taken place since 1967 in the economic, financial, and other conditions that affect AT&T's revenue requirements and its ability to attract new capital. The Commission noted particularly the sharp increase in the interest rates on borrowed capital, the resulting increase in the Company's cost of embedded debt, the much higher rate of inflation today, and the need to raise substantial amounts of new capital under current market conditions. These factors constitute substantial changes from the conditions which prevailed at the time of the 1967 decisions and must be reflected in a current assessment of the Company's cost of capital and revenue requirements.

There are also a number of uncertainties in the current situation and in the national economic outlook. These include the persistent inflationary trend, with its effects on the cost of capital; the effectiveness of the Government's efforts and policies to curb this trend and stabilize prices; the possible effects of such efforts on the continued growth of the economy; and the duration of any period of adjustment. Another uncertainty results from the present status of the Federal corporate income tax and surcharge, as well as the potential changes resulting from the "reform provisions" of the pending tax legislation.

In view of these uncertainties, the Commission wishes to make clear that the views expressed herein relate to the current situation and cannot be binding under any future changed economic conditions.

The Commission notes that technical changes in separations methods which it recently accepted at the request of the NARUC result in a \$35 million transfer of revenue requirements, to the benefit of users of local services subject to state regulatory jurisdiction.

The details of the rate changes are being worked out by the Company. The new rates will be submitted to the FCC in revised tariffs which will become effective on statutory notice.

Action by the Commission November 5, 1969. Commissioners Burch (Chairman), Bartley, Robert E. Lee, Cox and H. Rex Lee, with Commissioner Johnson dissenting and issuing a statement (attached).

Continuous Surveillance

Separate Statement of Commissioner Nicholas Johnson

I. Introduction

The Commission today offers for public view the results of its recent informal negotiations with the Bell System on the appropriate level of interstate rates. The effectiveness of the Commission in this area and the suitability of continuous surveillance as a regulatory technique can now be evaluated. My analysis indicates that the technique is rather ineffective and the Commission's adherence to announced principles is sharply limited when it comes into conflict with ATT. The Commission here issues a press release designed to show that significant decreases have "voluntarily" been agreed to by Bell. The implication is that some wonderful victory has been achieved for the consumer through the activities of the Commission and the benevolence of ATT. Unanswered is the question of whether enough has been achieved or whether the Commission's representation is a true reflection of the facts.

II. Continuous Surveillance as a Regulatory Technique

"Continuous surveillance" is a regular informal review of particular regulatory issues--in this case ATT's interstate rate of return. Informal closed door negotiations were held with Bell to examine going levels of earnings with a view to possible appropriate

action by the Commission or Bell. The theory is that in the context of these negotiations the Commission will be able to make an informed judgment as to what action would serve the interests of the public as consumers and that Bell would agree to take that action even though it is harmful to the interests of its stockholders. Initially there seems no reason that a regulated company would agree to actions inimicable to the interests of its stockholders. However, a company may in fact be willing to meet certain levels of public responsibility which are not too harmful in terms of stockholder reaction.

The Commission has certain penalties it can impose if a company is unresponsive. A company does not wish to receive the unfavorable publicity generated by public Commission criticism of a failure to respond to the interests of the consumer. (Thus, not only has the Commission negotiated with Bell on the rate reduction; the content of the FCC majority's press release was negotiated with Bell officials who are clearly concerned as much with publicity as with profits.) The Commission could issue a show cause order to require a recalcitrant company to prove why its rates should not be lowered. Finally, there is the threat of a full-scale investigation with its attendant uncertainty and unfavorable publicity. The Commission is not without weapons to compel action by the regulated company--even though the continuous surveillance proceeding is not a formal hearing from which orders may be issued.

There are severe limits to the Commission's ability to function in this type of a proceeding. Virtually all of the information was selected, packaged and presented by Bell--there was no direct case from our staff or outside representatives. There was no leavening from outside consumer representatives--even though the New York City Consumers Affairs Department requested (and was denied) the opportunity to appear. The negotiating process depends on the skill and dedication of the negotiators--and a company with a single position faces a multi-member Commission with a variety of positions. There are no limits on the lobbying efforts by the company--to staff or Commissioners--since ex parte rules do not apply. Whatever decisions are made--whether adjustments are needed, how much, what the company agrees to and how much the Commission compromises--are not normally explained publicly in the way formal decisions are. Public statements are made long after the decisions in fact have been made. Appeal from decisions is difficult--there is no opportunity to seek reconsideration of a formal Commission decision or appeal it to the courts. There are no parties to appeal. Apparently all that can be done is to petition for rejection of whatever revised tariffs Bell decides to file as a result of the negotiations.

III. Consumer Advocates

In response to some of the inherent problems with the continuous surveillance proceeding the Commission in this instance decided to

denominate two staff members to ask questions of the ATT witnesses from the consumer's point of view. Operating in a capacity separated from that of the Commission's Common Carrier Bureau staff, these staff members conducted their own cross-examination of Bell's witnesses and offered some additional materials relating to their examination. The quality and completeness of the information before the Commission was improved by their performance. Bell's discomfiture was obvious. On balance, the continuous surveillance process was clearly improved by this limited use of denominated consumer representatives.

The innovation did, however, heighten the tension as to the role of the Commission's staff in rate proceedings. The Commission has traditionally viewed its staff in ratemaking proceedings as combined protector-of-the-consumer and neutral adviser-to-the-Commission. I have elsewhere argued that the combined functions necessarily affects the quality of the consumer advocacy and this was confirmed by the experiment in this proceeding. A. T. & T., 9 F. C. C. 2d 30, 122 at 141 (1967). I believe the Commission ought to use staff consumer advocates in all important ratemaking matters. The Commission ought to do all it can to have forceful advocacy for alternatives presented to it--a necessary ingredient for competent choice in any decision-making process.

IV. Results Reached and Achieved

Bell argued it should be allowed to earn 8.5 to 9.0% on its total allowed rate base--and thus that the Commission should modify de facto its 1967 decision that the appropriate Bell rate of return was 7.0 to 7.5%. This 2% range from 7.0 to 9.0%, for interstate operations alone, could cost consumers as much as \$500 million more per year depending on the level fixed by the Commission. (A change of 0.1% in Bell's rate of return has a \$24 million effect on the amount of gross revenues the consumer must pay.) The majority concluded that Bell's current going rate of return is 8.25%, that 7.4% was appropriate for purposes of negotiation and a \$200 million rate reduction (after adjusting for stimulation effects) was warranted. (.25 minus 7.4 equals .85; .85 times \$24 million equals \$204 million). To this sum was added the \$90 million in MTT rates Bell had agreed to file as a result of price increases made in non-MTT (Telpak, TWX, Program Transmission) services. The majority was seeking \$290 million through negotiations conducted by the staff and the Telephone Committee.

Bell now says they have agreed to reduce rates by \$240 million. The majority's compromise in negotiations will cost the consumer \$50 million per year. The majority first sought \$200 million in

reduction plus the \$85-90 million MTT reductions as offsets to the other rate increases Bell has filed. Bell as a counter offered \$120 million plus the offsets. Bell also wanted a statement from the Commission that a return of 8% was justified. The majority commendably refused, although offering to say that a rate above 7.5% is justified, and that earnings "in the range" of 8.0 to 8.5% will result from its decision. It is, in any event, indisputably clear that the Commission today sanctions a rate of return in excess of 7 1/2%--the maximum permitted under its own prior order! Now Bell has offered to reduce MTT rates by \$240 million and the majority has accepted. The majority's compromise appears to cost the consumer \$50 million per year. In fact the majority's additional compromise from what it should have sought from Bell may cost the consumer \$250 million per year!

The majority's decision to seek only \$290 million in reductions in the face of Bell's present level of earnings severely harms the consumer and is a strong critique of the continuous surveillance process. Let us assume for the moment that the majority's 7.4% floor for Bell's rate of return is correct. Would \$300 million in reductions have reached this level? We can be almost certain that it would not. One need only examine the history of continuous surveillance as well as the results of the 1967 rate proceeding. Bell's interstate rate of return has never fallen below 7.5% since 1961. (1961--7.72%; 1962--7.55%; 1963--7.51%; 1964--7.99%; 1965--7.95%; 1966--8.29%; 1967--8.25%; 1968--7.60%.) Although rate reductions were occasionally achieved during this period, it is not at all clear that they were enough. Bell appears to have been successful in earning extra profits through the ineffectiveness of the continuous surveillance process. These profits may have led to a significant over-valuation of Bell's stock during this period and the subsequent readjustment.

The rate of return for 1968 is particularly significant. After a formal rate proceeding the Commission ordered Bell to file tariffs to reach an allowed rate of return of 7.0 to 7.5%. The effect of \$20 million in a \$120 million rate reduction order was deferred for a substantial period in 1968 out of the professed fear that earnings

might fall below the 7.0% level. [A. T. & T., 12 F. C. C.2d 167, 168 (1968)] The Commission's fears for Bell's financial health were misplaced. Not only did Bell not go below the lower end of the range, it exceeded the higher limit, earning 7.6%. As if this were not enough, only the Vietnam War and its attendant surtax saved the Commission from further embarrassment. Without the surtax Bell would have earned in the range of 8.2%--a full 0.7 to 1.2% above the range supposedly established by the Commission's 1967 decision. The record suggests that Commission decisions systematically err in Bell's favor on rate of return matters.

An examination of today's decision suggests some of the reasons for the FCC's errors. No estimate is made for growth in Bell's 1970 earnings, although Bell has enjoyed steady growth. No estimate is made for possible lower unit costs, although Bell proudly reports its cost-reducing achievements. No account is taken of the effects of relaxation of the income tax surcharge. If the surcharge rate is reduced to 5% on January 1, 1970, then \$70 million less gross revenues will be needed to reach 7.4%. By June 30, 1970, when the remaining 5% is scheduled to be lifted, another \$70 million less in gross revenues will be needed by Bell. Since the surveillance process generally takes at least a year from the time excess earnings occur, to Commission recognition, to Commission action, to tariff filing,

the majority's failure to take account of the probable effects of the surcharge changes may cost the consumer \$100 million in 1970. (The majority could have directed Bell to have tariff reductions in hand ready for filing when the surtax changes come. For this discussion it is recognized that Bell has effectively passed the entire surtax on to its consumers.)

The majority's willingness to settle for \$240 million in reductions can also be attacked for its de facto modification without hearing of the Commission's 1967 order. The Commission rejected the participation of outside parties representing consumer interests but did allow attendance by representatives from NARUC (the association of state regulatory commissioners). The majority has made a decision in fact, but there is no announcement of it, no rationale offered for it, and no consideration of the rights of parties who may feel aggrieved. A leading case is often cited for the proposition that no legal redress is available for decisions reached under continuous surveillance.

[The Public Utilities Commission of the State of California v. United States, 356 F.2d 236 (9th Cir. 1966)]. However, the fact that the Commission recently made an on-the-record determination, and now changes it without hearing, may present a different legal situation.

Bell argued that circumstances had changed from the 1967 environment, and that these changes warranted a change in their

allowed rate of return. Its evidence focused on one basic point--the change in the interest rate for long-term debt capital. The majority agreed with Bell to the tune of \$100 million per year. (The difference between a range of 7.0 to 7.5% and 7.4 to 7.9% is between \$24 million and \$196 million.) In 1967 the Commission reached two basic conclusions--the overall rate of return should be 7.0 to 7.5% and Bell had been severely negligent in not using more debt financing in the past, a policy that has been and continues to be costly to both consumer and shareholder.

The issues concerning proper capital financing of a public utility need not be as confusing as they appear. A company can raise capital by equity or by debt. Equity includes retained earnings and money gained from stock sales. Debt is capital borrowed from money-lenders at a fixed rate of interest. Other things being equal debt financing is generally less costly to the consumer while being beneficial to the stockholder. Debt costs less since the interest rate is normally lower than the required return for equity. Interest costs are a cost of doing business and as such are deducted before the payment of corporate income taxes. And for any given level of overall return the use of debt financing can often increase the pool of earnings available to equity holders.

Since the 1967 decision Bell has gone to all-debt financing and even at the present high interest rates, debt financing continues to exert a favorable leveraging effect on Bell's earnings. In fact as the staff consumer representatives pointed out in a chart submitted during cross-examination, Bell has been able to offset the effects of high interest through increased leverage.

1966 [Test Year] Allowed Rate of Return 7-7 1/2%

	<u>Low</u>	<u>High</u>
31.5% Debt at 4% Interest =	1.26	1.26
68.5%, Equity at 8.4-9.1% Return	<u>5.74</u>	<u>6.24</u>
Total Allowed Rate of Return	7.00	7.50

1969 Calculation Incorporating:

1. Higher interest rates being paid;
2. Changed capital structure;
3. The same return on equity range as allowed in the 1967 decision.

	<u>Low</u>	<u>High</u>
40% Debt at 5% Interest =	2.00	2.00
60% Equity at 8.4-9.1% Return =	<u>5.04</u>	<u>5.46</u>
Total Allowed Rate of Return	7.04	7.46

Note: The increased interest cost for debt is counteracted by the increase in debt ratio so that if the return on equity remains the same, the allowed rate of return would remain the same.

The majority's calculation is perhaps simpler. In 1967 the Commission said the Bell System could be earning at least 9% on equity if it had achieved a debt ratio of 40% at 4% embedded interest cost, although Bell had debt ratio of about 35% at the time. (A debt ratio is the ratio of the amount of debt to the total capital of a company-- a company with \$100,000 total capital of which \$35,000 is debt has a 35% debt ratio. "Embedded interest cost" is the average interest rate being paid on debt capital of the company.)

If Bell had a 40% debt ratio and was paying on the average of 4% in interest, a 7% overall return on capital would result in a 9% return to equity.

40% debt times 4% interest =	1.6%
60% equity times 9% return =	5.4%
	<u>7.0%</u> Total return

At 7.5% return Bell would be earning 9.83% on equity.

40% debt times 4% interest =	1.6%
60% equity times 9.83% return =	5.9%
	<u>7.5%</u> Total return

Today Bell has a 40% debt ratio but borrowing at higher interest rates has made its average interest cost for all debt capital 5%. In order to achieve a 9% return on equity, the overall rate of return must be set at 7.4%, the majority's figure.

40% debt times 5% interest =	2.0%
60% equity times 9% return =	5.4%
	<u>7.4%</u>

The crucial question is whether the 1967 decision "guaranteed" Bell a 9% return on equity. There is a strong suggestion it did not. As noted, a 7.0 to 7.5% rate of return suggested a return on equity based on 1966 test year data of 8.4% to 9.1%. The leveraging effect of all-debt financing has retained that range of equity return even if there is no change in the allowed range of 7.0 to 7.5% on total capital. And there was no demonstration by ATT that the fundamental factors affecting the required return on equity have caused the cost of equity capital to ATT to increase.

The majority could easily have taken account both of the surtax and reduced the going rate of return to 7.0%. It could have made some estimate of the impact on rate of return in 1970 from growth and lower cost technology. It did not. Cost to the consumer: at least \$200 million a year.

V. Conclusion

There are a number of concluding comments which seem relevant. Consumers and Bell's shareholders continue to suffer from Bell's past errors in financing. Bell abhorred debt financing in periods of low interest rates and thus finds it necessary (and cheaper) to use debt exclusively at a time of very high interest rates. But it is even more disquieting that Bell now speaks of returning to equity via convertible

The majority's calculation is perhaps simpler. In 1967 the Commission said the Bell System could be earning at least 9% on equity if it had achieved a debt ratio of 40% at 4% embedded interest cost, although Bell had debt ratio of about 35% at the time. (A debt ratio is the ratio of the amount of debt to the total capital of a company-- a company with \$100,000 total capital of which \$35,000 is debt has a 35% debt ratio. "Embedded interest cost" is the average interest rate being paid on debt capital of the company.)

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	<u>7.0%</u> Total return

At 7.5% return Bell would be earning 9.83% on equity.

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60% equity times 9.83% return =	5.9%
	<u>7.5%</u> Total return

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40% debt times 5% interest =	2.0%
60% equity times 9% return =	5.4%
	<u>7.4%</u>

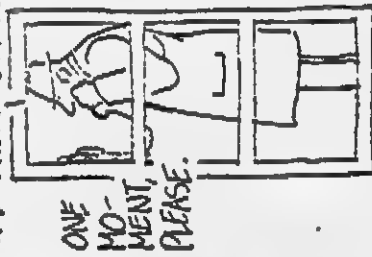
on the use of liberalized depreciation are very likely of the same order of magnitude as the errors in capital financing--with the attendant adverse impact on the consumer and stockholder. The Commission implicitly allows Bell to pass the full amount of the Vietnam surtax on to consumers for the purpose of rate level calculations. A strong case can be made that Bell should bear at least some of the costs of this special war-inflation tax and the Commission said in a letter to the then Consumer Affairs Assistant, Betty Furness in 1968 that it would at least consider that possibility.

Bell and the FCC use electric utilities for comparison purposes. Several comments are relevant. Implicit is the assumption that the regulation of the electrics has achieved a proper rate of return and thus the performance of the electrics is a proper benchmark. Some might disagree. Senator Lee Metcalf in his book, Overcharge, urges that in fact electric utilities--the FCC's comparative standard--are earning too much. [Metcalf and Reimer, Overcharge (1967)]. But even so the electrics, because of a higher debt ratio, require less in overall rate of return (6.7% in 1968 for the electrics to Bell's 7.6%) while returning more to equity holders (11.9% in 1968 for the electrics to Bell's 9.3%). The electrics also make substantial use of liberalized depreciation.

Bell's contempt for the consumer is clear, not only for refusing to lower exorbitant rates but also for its shocking acquiescence in the decline in the quality of telephone service its slipshod performance has permitted, as Jules Feiffer has so concisely portrayed:

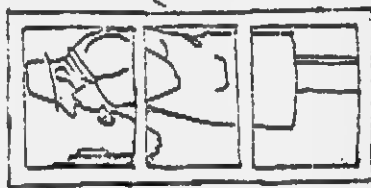
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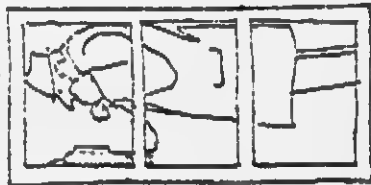


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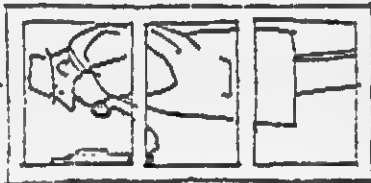
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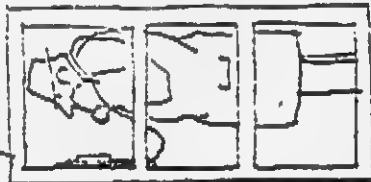


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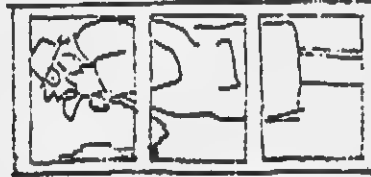
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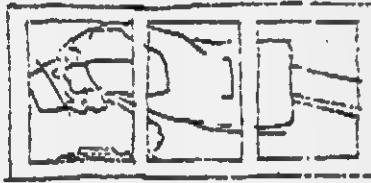


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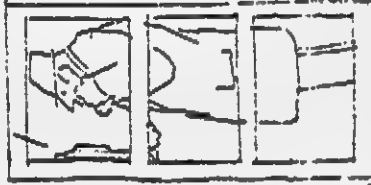
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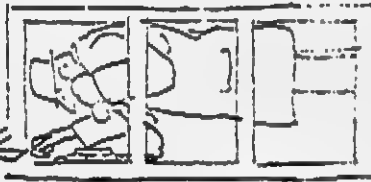
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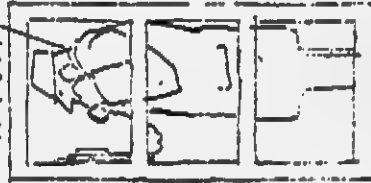


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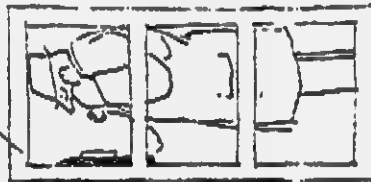


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© 1969 Jules Feiffer - 10-19

It is difficult to evaluate the process of continuous surveillance as a regulatory tool. It offers some real procedural benefits. But it requires somewhat more than the Commission was able to bring to it this time.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of)

American Telephone and Telegraph Company)
Long Lines Department)

Revisions of Tariff F.C.C. No. 260, Private)
Line Services, Series 5000 (Telpak))

American Telephone and Telegraph Company)

Revision of American Telephone and Telegraph)
Company Tariff F.C.C. No. 260, Series 6000)
and 7000 Channels (Program Transmission Services))

American Telephone and Telegraph Company)

Revision of American Telephone and Telegraph)
Company Tariff F.C.C. No. 133, Teletypewriter)
Exchange Service)

DOCKET NO. 18128

DOCKET NO. 18684

DOCKET NO. 18718

O R D E R

Issued November 14, 1969; Released November 14, 1969

Underlying these three proceedings are cost studies made pursuant to the "Statement of Ratemaking Principles and Factors in Docket No. 16258" (Appendix A, Memorandum Opinion and Order adopted July 29, 1969, in Docket Nos. 16258, 15011, and 18128, 18 FCC 2d 761, 765). It is desirable that appropriate procedures be developed to obviate the possibility of duplication in the presentation of and cross-examination on such studies;

IT IS ORDERED, That there be a joint prehearing conference of the parties in the above-entitled proceedings for the purpose of exploring possible procedures in the light of the foregoing, before the undersigned, at 9:00 AM on January 8, 1970 at the offices of the Commission in Washington, D. C.

Thomas H. Donahue

David I. Kraushaar

Frederick W. Danniston
Hearing Examiners
Federal Communications Commission

Ben F. Waple
Ben F. Waple
Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of)	
	:	
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,)	
LONG LINES DEPARTMENT	:	
)	
Revisions of Tariff F.C.C. No. 260, Private	:	Docket No. 18128
Line Services, Series 5000 (Telpak))	
	:	
Proposed Further TELPAK Rate Increases,)	Transmittal No. 10609
Tariff F.C.C. No. 260, Series 5000 Service	:	
)	

To: The Commission En Banc

PETITION FOR RECONSIDERATION PREDICATED PRINCIPALLY
UPON NEW FACTS REFLECTING BASIC MISCONCEPTIONS AND
RESULTING IN APPARENT PREJUDGMENT

Come now the Air Transport Association of America, United Air Lines, Inc., Eastern Air Lines, Inc., and Emery Air Freight Corporation, hereinafter collectively designated "Airline Industry Parties", and pursuant to the provisions of Section 405 of the Communications Act of 1934, as amended,^{1/} and Section 1.106 of the Commission's Rules and Regulations,^{2/} respectfully petition for reconsideration of the Commission's Memorandum Opinion and Order (FCC 69-1196) adopted on October 29, 1969, and released November 6, 1969, insofar as it denied their petition to reject, or require or secure withdrawal of, further TELPAK rate increases.

^{1/} 47 U.S.C. §405.
^{2/} 47 C.F.R. §1.106.

In support hereof, petitioners respectfully state as follows:

I. Preliminary

1. The purpose of this petition for reconsideration is not to "rehash" the grounds of our original "Petition To Reject Etc." which, however, to avoid needless repetition, is incorporated herein by reference in support hereof, and especially with respect to the procedural posture of undetermined questions in prior and still pending Telpak rate proceedings. Neither is it the purpose of this petition to offend the Commission by attacking the personal integrity of the Commission or of any of its members.

2. Instead, the purpose here is to perform our duty to the Commission and to ourselves by putting into proper perspective, vis a vis the Commission's Opinion and Order adopted October 29, 1969,^{3/} the most recent action of the Commission (November 5, 1969)^{4/} with respect to interstate message toll rate reductions called for by the over-all revenues of AT&T. This we are constrained to do, because we earnestly believe that the Commission's recent interrelated actions demonstrate a fundamental misconception of the proper relation between its duties and responsibilities with respect to (a) surveillance proceedings as to over-all rate of return, on the one hand, and (b) prior pending non-surveillance, adversary, adjudicatory proceedings with respect to rate levels and rates

^{3/} FCC 69-1196, released November 6, 1969.

^{4/} FCC 69-1210, released November 5, 1969, attached hereto as Appendix A.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of)	
	:	
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,)	
LONG LINES DEPARTMENT	:	
)	
Revisions of Tariff F.C.C. No. 260, Private	:	Docket No. 18128
Line Services, Series 5000 (Telpak))	
	:	
Proposed Further TELPAK Rate Increases,)	Transmittal No. 10609
Tariff F.C.C. No. 260, Series 5000 Service	:	
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To: The Commission En Banc

PETITION FOR RECONSIDERATION PREDICATED PRINCIPALLY
UPON NEW FACTS REFLECTING BASIC MISCONCEPTIONS AND
RESULTING IN APPARENT PREJUDGMENT

Come now the Air Transport Association of America, United Air Lines, Inc., Eastern Air Lines, Inc., and Emery Air Freight Corporation, hereinafter collectively designated "Airline Industry Parties", and pursuant to the provisions of Section 405 of the Communications Act of 1934, as amended, ^{1/} and Section 1.106 of the Commission's Rules and Regulations, ^{2/} respectfully petition for reconsideration of the Commission's Memorandum Opinion and Order (FCC 69-1196) adopted on October 29, 1969, and released November 6, 1969, insofar as it denied their petition to reject, or require or secure withdrawal of, further TELPAK rate increases.

^{1/} 47 U.S.C. §405.
^{2/} 47 C.F.R. §1.106.

In support hereof, petitioners respectfully state as follows:

I. Preliminary

1. The purpose of this petition for reconsideration is not to "rehash" the grounds of our original "Petition To Reject Etc." which, however, to avoid needless repetition, is incorporated herein by reference in support hereof, and especially with respect to the procedural posture of undetermined questions in prior and still pending Telpak rate proceedings. Neither is it the purpose of this petition to offend the Commission by attacking the personal integrity of the Commission or of any of its members.

2. Instead, the purpose here is to perform our duty to the Commission and to ourselves by putting into proper perspective, vis a vis the Commission's Opinion and Order adopted October 29, 1969,^{3/} the most recent action of the Commission (November 5, 1969)^{4/} with respect to interstate message toll rate reductions called for by the over-all revenues of AT&T. This we are constrained to do, because we earnestly believe that the Commission's recent interrelated actions demonstrate a fundamental misconception of the proper relation between its duties and responsibilities with respect to (a) surveillance proceedings as to over-all rate of return, on the one hand, and (b) prior pending non-surveillance, adversary, adjudicatory proceedings with respect to rate levels and rates

^{3/} FCC 69-1196, released November 6, 1969.

^{4/} FCC 69-1210, released November 5, 1969, attached hereto as Appendix A.

for specific classes of service, on the other hand.

II. Grounds

3. The truth usually "outs", and is now out in the form of the Separate Statement of Commissioner Nicholas Johnson attached to the Commission's Public Notice of November 5, 1969, on the two-step Commission ordered reduction in message toll rates, first, in the revenue reduction amount of \$150,000,000 to become effective January 1, 1970, and next, in the revenue reduction amount of \$87,000,000, to be effective on February 1, 1970, by way of "an off-set to increases in revenue resulting from higher rates recently filed for program transmission, Telpak and teletypewriter exchange (TWX) services when the latter increases become effective".^{5/}

This is the way it was put even in the Commission's release. Commissioner Johnson's Separate Statement further reveals how the over-all reduction of 237 million dollars was negotiated, and more specifically:

- a. That "the majority was seeking \$290 million through negotiations conducted by the staff and the Telephone Committee" (p. 5).
- b. That "Bell as a counter offered \$120 million plus the offsets", or a total of \$207 million (p. 6).
- c. That Bell finally "agreed to reduce rates by \$240 million" [in fact, \$237 million including \$87 million in offsets to other specific increases] (p. 5).
- d. That then, in order to protect the impression that "some wonderful victory has been achieved for the consumer through the activities of the Commission and the benevolence of ATT" (p. 1), "the content of the majority's press release was negotiated with Bell officials who are clearly concerned as much with publicity as with profits" (p. 2).

^{5/} Ibid, p. 1.

4. The uninitiated and the unsuspecting might ask, what is wrong with such a fine result, politically and otherwise, for such a large portion of the public - the users of message toll service?^{6/} Commissioner Johnson's primary concern obviously was with the total amount of the message toll reduction, rather than with the propriety of coupling offsetting increases in other specific rates. Our principal concern, however, is just the reverse. Like all users of Bell's interstate services, we have an interest, of course, in its over-all revenues under a Commission allowed rate or range of rate of return, but our concern here is not with the total amount of message toll revenue reduction which the Commission ordered in order to bring AT&T's rate of return in line with the Commission's present views thereon in the light of present and prospective conditions. Instead, our concern is directly and primarily with the propriety of tying a substantial part (87 million dollars) of the over-all revenue reduction to an increased level of rates for specific classes of service such as Telpak, and especially so in view of the posture of prior pending and undetermined proceedings with respect to the proper level of such rates.

5. The continuing surveillance procedure may well serve a useful function with respect to reductions from time to time in interstate message toll rates (the primary service of AT&T from which it derives 80% or more of its interstate revenues) in order to keep total interstate revenues within the previously allowed range of rate of return. There, of course, is where

^{6/} It should be emphasized, however, that such decreases relate only to interstate message toll users. As pointed out by the recent protest of the National Association of Regulatory Utility Commissioners, the Bell System has pending in excess of \$500 million in rate increases applicable to local telephone calls. The Wall Street Journal, Nov. 11, 1969, p. 9.

the leverage lies in adjusting over-all revenues by the surveillance procedure. And if the Commission through this procedure had simply ordered an "X" million dollar reduction in message toll revenues without regard to offsetting increases in rates for other specific services, TELPAK users such as the airline industry would probably have no complaint short of participation in some new or reopened formal proceeding with respect to allowable rate or range of rate of return. But when the Commission ties 87 million dollars of reduction for the message-toll users, with no accounting and which they will receive in any event, to 87 million dollars of contested increases in other specific rates, which theoretically are subject to further hearing and an accounting, on top of a prior undetermined rate increase and accounting in the case of Telpak rates, the Commission has put itself in a compromised and indefensible position. As inadvertent, misguided, or misconceived as this result may have been, it is nonetheless very real to Telpak users. Once AT&T has performed its part of the over-all negotiation and put into effect not only the \$150 million non-offset reduction but also the \$87 million offset reduction, with no strings attached to either, what likelihood is there, realistically, for Telpak users or the public they largely serve (taxpayers and public service corporation ratepayers) that the Commission will find for such users on the specific offsetting Telpak second round of rate increase, much less on such prior undetermined questions as:

(a) the compensatory character of the original Telpak C and D rates, including determination of the ratemaking principles and factors, and costing methods and results, absolutely essential to a determination of whether or not one class of competitive service is burdening any other service, and

(b) the propriety of the first round of Telpak rate increases of September 1, 1968, in the light of proper determination of all the foregoing and underlying questions of principle and of fact?^{7/}

6. It is no answer to say, as Commissioner Cox did in his Separate Statement to the Commission's Order of October 29, 1969:

"In view of the long delay in correcting the discriminatory Telpak rates, I would suspend the new tariff for only one day, or until the company files tariffs covering the off-setting reductions in message ^{8/} toll reductions which are to be made". (Emphasis added)

Nor to say, as Commissioner Johnson did in his dissent to the same order:

"Telpak is the service which the Commission has believed could be noncompensatory, that is, its rates do not compensate for its costs and are designed to meet competition from private carriers."^{9/}

While each of these Commissioners states it somewhat differently, each has apparently relied upon a predilection to the effect that Telpak rates have been too low for too long and therefore should be "corrected" as promptly as possible. In the absence of prejudgment as to the proper level for Telpak rates, what is there to "correct", and upon what Commission determination in any prior Telpak rate proceeding does this kind of a

^{7/} Asked at a press conference "what would happen if the FCC ultimately ruled out the increased telpak, program, and TWX rates which are to be offset with message toll reductions Feb. 1, Common Carrier Bureau Chief Bernard Strassburg observed that 'we'll cross that bridge when we come to it.'" Telecommunications Reports, Nov. 10, 1969, pp.5-6.

^{8/} FCC 69-1196 (1969), separate statement of Commissioner Cox.

^{9/} FCC 69-1196 (1969), dissenting opinion, p. 1.

position rest? The only relevant adjudication the Commission has ever made was its original finding -

"There is apparent justification for Telpak C&D classifications in terms of meeting competition from private microwave systems having channel capacities comparable to those offered by such Telpak classifications", ^{10/}

and its reopening of the record in the original Telpak Case to consider and determine -

"whether or not the existing rates for Telpak C and D are compensatory". ^{11/}

The latter question, in turn, was first folded into Phase I-B of Docket 16258 (over the objection of the users who sought a determination in the original proceeding), and then, when Phase I-B turned out to be abortive by reason of the "bob-tailing" of that proceeding, largely at the instance of AT&T and the Commission's staff, was put over into Docket 18128, along with all the same underlying and undetermined questions with respect to the roughly 50% Telpak rate increases of September 1, 1968, which over protest, had been permitted to go into effect with an accounting order.

7. In this connection, Commissioner Johnson's most recent statement in this docket with respect to the non-adjudicatory character of the termination of hearing proceedings in Docket 16258 is pertinent indeed:

^{10/} 37 F.C.C. 1111, 1118 (1964).
^{11/} 38 F.C.C. 370, 395 (1964).

"The majority's discussion here confirms not only the hopeless ambiguity of the so-called 'stipulation' [In Docket 16258] but also demonstrates that resolution of questions regarding pricing policy and price discrimination are no further along now than they were in 1965 when the over-all rate investigation--Dkt. No. 16258--was begun to deal with them. * * * And as the majority points out in paragraph 12, the lawfulness of the original Telpak offerings is still in question." (Emphasis added)^{12/}

In the light of those undisputed and indisputable statements as to the posture of the record on undetermined questions, how could any member of the Commission rightfully predicate any off-setting rate increase or rate decrease action of the Commission on any predilection with respect to probable "resolution" of all the undetermined underlying questions adversely to the interests of the Telpak users? To ask the question is to answer it.

8. The judgment of one adversary party (AT&T) to prior undetermined adversary proceedings cannot be accepted in advance by the Commission as the proper "resolution" of either the legal or factual issues of those proceedings, and especially not where the acceptance of such judgment is designed to cost the carrier nothing, since under this part of the agreement, all the dollars "out" of one pocket are to be replaced by a like amount of dollars "in" the other pocket. The trouble still is that one is under surveillance and the other is in undetermined litigation, and present results in one simply cannot be offset against projected results in the other without prejudging the latter.

^{12/} FCC 69-1196, dissenting opinion, pp. 2-3.

9. From all the foregoing, it is clear that in the process of concurrently conducting and concluding surveillance procedures for regulating AT&T's over-all revenues under an appropriate over-all rate or range of rate of return under present conditions, the Commission has fallen into grievous error in trying to negotiate rate levels for specific services as part of the same surveillance procedure, and without regard to the inherent and fundamental limitations of due process imposed by the pendency of specific adversary proceedings for determination of all the underlying questions with respect to such rate levels and rates. A package arrangement with respect to both subjects simply cannot be made without prejudice to the rights of parties to the adversary proceedings who are not even parties -- much less privy -- to the surveillance proceedings designed for a distinctly different purpose. The basic error of the Commission is conceptual and lies in its failure or refusal to recognize the underlying distinction between surveillance and non surveillance or adversary proceedings. There is no way to compromise one as a part of the other, without the consent of all parties which obviously was not sought or obtained.

10. In common fairness to all, and in preservation of the integrity of quasi-judicial proceedings before the Commission, it is urged that the Commission promptly rectify the compromise which it had no right to make, much less to perform, to the inevitable prejudice of Telpak users. From the standpoint of the rights of parties to the present proceeding, the clearest way to rectify

this error would be to reconsider and upon reconsideration to reject the second round of Telpak rate increases pending Commission determination of undetermined questions with respect to the original Telpak C and D rates and with respect to the first round of rate increases. The question of what then happens to the \$87 million of message toll reduction which had been tied to the \$87 million of increases for such special classes of service as Telpak, serves only to demonstrate the inherent fallacy in what the Commission had previously attempted to do. The answer must be that the total amount of reduction in over-all revenues, to be accomplished by reduction in message toll rates (the source of over 80% of total revenues), then stands on its own merits under continuing surveillance, and without prejudgment or apparent prejudgment of the merits of the proper level of Telpak rates, the subject of at least two prior undetermined adversary proceedings now joined into a third adversary proceeding unheard and undetermined. Thus, with each subject of the Commission's jurisdiction to stand on its own merits, not only fairness but the appearance of fairness would be preserved. The Courts have consistently held that the "appearance of fairness and impartiality is probably of as great importance as its attainment, if the public is to have confidence in the judicial processes".^{13/}

^{13/} Jarrott v. Scrivener, 225 F. Supp. 827, 834 (D.C. D.C. 1964). To the same effect, see also Amos Treat & Co. v. SEC, 306 F.2d 260, 263, 266-67 (D.C. Cir. 1962); Texaco, Inc. v. FTC, 336 F. 2d 754 (D.C. Cir. 1964), remanded on other grounds 381 U.S. 739 (1965); Trans World Airlines, Inc. v. CAB, 254 F. 2d 90 (D.C. Cir. 1958); Gilligan, Will & Co. v. SEC, 267 F. 2d 461, 468-69 (2d Cir. 1959), cert. den. 361 U.S. 896 (1959).

11. In light of the early date of February 1, 1970, when the further TELPAK rate increases are scheduled to become effective, it is respectfully requested that early consideration be given to this petition for reconsideration.

WHEREFORE, THE PREMISES CONSIDERED, The Airline Industry Parties respectfully petition:

1. That the Commission reconsider its Memorandum Opinion and Order here complained of, insofar as it denied their petition to reject, or require or secure withdrawal of, further TELPAK rate increases.

2. That upon such reconsideration thereof, the Commission grant the relief requested in said petition.

3. That the Commission grant such other and further relief as to the Commission may seem just and proper in the premises.

Respectfully submitted,

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Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
AMERICAN TELEPHONE AND)
TELEGRAPH COMPANY) DOCKET NO. 18128
Long Lines Department)
Revisions of Tariff F. C. C. No. 260,)
Private Line Services, Series 5000)
(TELPAK))

To: The Commission

MOTION OF AEROSPACE INDUSTRIES ASSOCIATION
OF AMERICA, INC., TO AMEND ORDER PROVIDING FOR
SUSPENSION OF AMERICAN TELEPHONE AND TELEGRAPH
COMPANY'S INCREASED RATE FILINGS FOR ITS PRIVATE
LINE SERVICES, SERIES 5000 (TELPAK).

Aerospace Industries Association of America, Inc. (hereinafter "AIA"), by its attorneys, hereby respectfully petitions the Commission to amend its Orders suspending American Telephone and Telegraph Company's (hereinafter "AT&T"), increased rate filings for its Private Line Services, Series 5000 (TELPAK), to specify that AT&T be required to pay at least 8.5 percent interest, compounded on a monthly basis, on any portion of the increased rates which the Commission ultimately finds to be unjustified and orders refunded. In support whereof, the following is respectfully submitted:

I. Preliminary Statement

1. On April 10, 1968 the Commission issued an order in this Docket suspending until September 1, 1968, certain increased rates for the Telpak service which AT&T had filed in revision of Tariff F.C.C. No. 260, to go into effect on June 1, 1968. (FCC 68-388, 33 Fed. Reg. 3708) By Memorandum Opinion and Order of July 10, 1968 (FCC 68-711; 13 F.C.C. 2d 853) it, inter alia, made any rates which AT&T might put into effect at the end of the suspension period subject to an accounting order, and prescribed therein that "upon completion of the hearing and decision therein the Commission may by further order require the refund thereof, with interest, pursuant to Section 205 of the Communications Act of 1934, as amended" (Id. at 858)

2. Again on October 29, 1969, the Commission by Memorandum Opinion and Order (FCC 69-1196 issued November 6, 1969) suspended for three months, until February 1, 1970, further increases in the Telpak rates which AT&T had submitted for filing in Transmittal No. 10609. The Commission's order consolidated the new increases with the older one for hearing in Docket 18128, ordered an accounting, and, as in the case of the previous accounting order, specified that the Commission might by further order after hearing and decision require refund of any portion of the increase found to be unjust, unreasonable or otherwise unlawful, "with interest".

3. For reasons set out in detail in our previous pleadings, AIA, along with other intervenors herein, believes, under the circumstances here prevailing, that the Commission was obligated as a matter of law to take steps to reject, secure the withdrawal of, or postpone the effectiveness of this latest Telpak rate increase. We reserve all rights with respect to the Commission's rejection of these arguments. But, assuming arguendo, the continuing validity of the procedures which have been prescribed for this proceeding, AIA is of the belief that the public interest would be served, and the possibility for an early decision in this long postponed proceeding substantially enhanced, if the Commission were to now amend its accounting orders to prescribe the rate of interest which will be made applicable to any refunds which may be ordered as a result of this proceeding. While we are convinced that specification of a substantially higher rate would be an appropriate exercise of the Commission's discretion as well as clearly lawful under the governing case law, we ask only that the rate be specified at at least 8-1/2 percent, and that any interest payments be ordered to be compounded monthly.

II. The Reason for Acting Now

4. As indicated above, the Commission in its several accounting orders herein has provided that, if after hearing it finds the suspended Telpak rates to be too high, it "may" by subsequent order direct refunds be

made of the unlawful portion of the increased rate which has been collected, "with interest". The use of the subjunctive with respect to both the possibility of refunds and interest thereon undoubtedly reflects the use of statutory language appearing in Section 204 of the Communications Act to indicate that ^{1/} some or all of the increases may be found to be unlawful, since it would be the clearest abuse of discretion (assuming any discretion in fact exists) to permit a carrier to retain any portion of increased rates the Commission after suspension and hearing finds to have been unlawful. The same is true with respect to the payment of interest upon such amounts; were this not the case the Communications Act would serve as a vehicle for the carriers securing large interest free loans from their customers by their unilateral action in filing rate increases. The magnitude of the interest problem can be demonstrated by indicating that, at simple 8 percent interest on the original Telpak rate increase which became effective on September 1, 1968, assuming the applicability to 1968-1969 of AT&T's prediction that by 1971 the increase in annual Telpak revenue over the previous rate would amount to \$67,000,000 per annum, already amounts to over \$6,000,000. While

^{1/} We assume the reference in the two orders to Section 205 of the Act, which in terms relates only to prospective reductions and does not contain the authorization for refunds, with interest, of portions of increased rates found to be unlawful merely indicates that the standards for judging the lawfulness of increased rates are found in Section 205.

assumptions to the rate of interest, the amount of annual revenue increase, and the percentage of the increase which might be found to be unlawful can vary considerably, the fact that very large sums of potential interest will be involved before the present proceeding is terminated, cannot be disputed.

5. Unlike the situation at the Federal Power Commission, which has a long history of rate increase cases and has always ordered refunds with interest of any amounts subsequently found to have been unlawful, the Federal Communications Commission has had little experience with formal rate increase cases where higher rates which have become effective after the suspension period expires are subsequently found to be unlawful in whole or in part. We have been unable to find reports of any such case where refunds and interest were either ordered or not ordered.

6. In the situation of proceedings brought under Sections 206 and 207 of the Communications Act to secure damages for carrier violations of the requirements of the Act (an area in which there is no statutory reference to interest) the Commission has in two recent cases refused to award interest in circumstances where the complainant either "did not claim interest, and introduced no evidence on prevailing rates" (WSAZ, Inc. v. American Telephone and Telegraph Company, 31 F.C.C. 175, 194 (1961)), or where, having so requested, failed to adduce evidence on prevailing interest rates or "showing the amounts of the individual monthly overpayments or the dates

thereof". (United States v. American Telephone & Telegraph Company,
3 F.C.C. 2d 939, 943-944) ^{2/} The two cases recognize (the former implicitly,
the latter expressly) that, even in such reparation situations, interest is
appropriate upon a proper showing. The holdings that the complainants had
not met their burden of demonstrating the proper measure of interest, what-
ever their validity in the context of a damages claim, would appear to have
no weight in the present situation where the burden of proof of justifying the
rate increase has been placed upon the carrier by Congress, and refunds
with interest are specified as the appropriate relief where the carrier's
burden is not met.

7. We, therefore, have no doubt that the Commission intends to
order refunds, with appropriate interest, of any sums collected under the
suspended rates it subsequently determines are unlawful. However, we
believe it should clearly say so now to avoid unnecessary controversy and
delay at later stages of the proceeding. The necessity for such a holding is
enhanced by the fact that AT&T has announced that it will reduce rates in the
interstate message service on February 1, 1970, by an amount calculated,

^{2/} Neither case involved a consideration of the issue by the Commission
itself. In WSAZ the hearing examiner's initial opinion became effec-
tive, in the absence of exception, pursuant to Section 1.153 of the Com-
mission's Rules. The other case involves an opinion of the Review
Board, from which no Commission review was sought.

on an annual basis, to equal the additional revenues from its latest Telpak increase. The history of AT&T's resistance to the uncontested rate reductions in the Private Line Cases (Docket Nos. 11645 et al.) while the rate increases ordered therein were undergoing court review, indicates all too clearly that it is likely to resist paying any refunds, or at least paying any interest thereon, as long as any ambiguity as to the Commission's intent remains.

8. The mere announcement that refunds with interest will be forthcoming to the extent an overcharge is found to exist is, however, not sufficient protection to the public interest. The Commission should, instead, follow the lead of the Federal Power Commission in this respect, by specifying at the outset the rate of any interest which is to be paid. There are two basic reasons why this is so. First, it will permit all parties and particularly the carriers to plan knowingly and avoid any subsequent claim that various forms of action might have been taken had the carrier only known that such a "high" rate of interest was to be prescribed. Second, it will avoid what will otherwise almost certainly turn out to be time consuming introduction and cross-examination of evidence and filing of pleadings upon a matter which essentially calls for a policy determination by the Commission. We have no doubt that the hearing issues in this docket are broad enough to encompass questions of the proper interest rate, but to burden the hearing with such considerations would be a useless expenditure of time and effort.

9. We wish to stress that in the context of rate increase proceedings there is no merit to any claim that the appropriate rate of interest must or should be tied to a concept of the "prevailing rate". The Federal Power Commission operating under the Natural Gas Act, which contains provisions for refunds, with interest, in rate increase cases virtually identical with those of the Communications Act, ^{3/} has long fixed a flat rate of interest in its accounting orders in pipeline rate cases at levels which, until recently, were well above the prime rate in existence, both at the time of the order and throughout the period of overcharge collection. Its authority to do so, even where the specified rate of interest was substantially more than the prime rate, has been expressly upheld when challenged upon review. Permian Basin Area Rate Cases, 390 U.S. 747, 825 n. 116; see United Gas v. Callery Properties, Inc., 382 U.S. 233, 230. Nor is it relevant that these cases involved natural gas producer rate increases and the Federal Power Commission had prescribed a 7% rate of interest for such rate increases by rule (See FPC Regulation under the Natural Gas Act, Section 154.102(c); 18 CFR 154.102(c)). This determination to proceed by

^{3/} The Federal Power Commission may, by order, require the natural gas company ". . . to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and on whose behalf such amounts were paid, and upon completion of the hearing and decision to order such natural gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified." Natural Gas Act, Section 4(e), 15 U.S.C. 3717c.

rule in the producer situation reflects an administrative determination of the best way of dealing with the thousands of individual producer rate increases which do not lend themselves to individual accounting orders. In the natural gas pipeline sphere, where the cases are both less numerous and involve much greater potential refunds, there is no rule and the Commission has consistently specified the appropriate rate of interest (usually well above the current prime rate) on an ad hoc basis in the particular accounting order. See SEC v. Chenery Corp., 332 U.S. 194 (1947).

10. Not only is there no legal need to attempt to determine the "prevailing rate" of interest, (or rather the prevailing rates - since over the period of time necessary to try a major rate case, the prevailing rate - whatever it may be determined to be - will almost certainly fluctuate), but the effort almost certainly will be as meaningless from an economic standpoint as it is tedious if not impossible as a matter of "proof". Whatever may have been the case in more simple periods, there is now no likelihood of objectively determining any single "prevailing rate", even if only one seller and one buyer are involved, both of whom are able to secure the prime rate on certain bank loans. Questions of compensatory balance requirements, patterns of borrowing versus self-generation of needed funds, and the varying types of credit arrangements will make the the search for a single "prevailing rate" an exercise in judgment rather

than objective truth. And where numerous customers, with different credit resources and needs are involved, the difficult rapidly becomes the impossible.⁴ It is important to recognize in this respect that the appropriate interest rate in a rate increase situation is not merely a product of the necessity for preventing unjust enrichment of the common carrier. The time value to its customers of the funds unlawfully foregone is of, at least, equal significance.

III. The Appropriate Rate

11. The present prime rate for bank loans is 8-1/2%. It has been at this level since June 9, 1969, and there are no indications that it will change in the near future or that, if there is a change, it will go down rather than up. But it is well recognized that the prime rate is not a true measure of the cost of money. Most borrowers, including many whose communications needs justify the use of Telpak, will not qualify for the prime rate. And the effective rate for even those that do qualify, may be substantially higher due to the necessity of maintaining compensatory balances of as much as twenty percent of the principal amount of the loan. It would thus appear that the effective cost of money in today's market is well over 10 percent.

⁴/ Fixing different interest rates dependent upon the differing costs of money to the carrier's customers would appear to be a discrimination prohibited by the Act. See United States v. AT&T, supra, at 944.

12. Similarly the market for long term debt obligations is at an all time high. The New York Times for November 13, 1969 (p. 65) indicates that an issue of a Bell System subsidiary, rated AAA, has just sold for an effective price of 8.534%. This, in turn, is just marginally higher than the rates at which other Bell System bonds have sold in the most recent period.

13. Under these circumstances the Federal Power Commission precedents indicate that fixing an interest rate of up to 10% would be clearly ^{5/} lawful and anything less than the 8.5% prime rate would almost certainly provide AT&T with a windfall to the extent its challenged increases are held to have been improper. Even if Docket 18128 remains undecided by the Commission for another year or so, the likelihood of the effective cost of short term money for most Telpak customers going below 8.5% is remote, and in any event such a reduction would be largely, if not entirely, offset by the higher effective rate in lending now and certain to continue into the immediate future.

14. It could conceivably be argued that, at least with respect to the original Telpak rate increase that went into effect on September 1, 1968, a different measure of interest, perhaps geared to the shifts in the prime

^{5/} At the time the 7% rate approved in the Permian case, supra, was adopted, the prime rate was 4.5 - 5%.

rate, should be adopted. It is true that the prime rate as of September 1, 1968 was only 6-1/2%, and that, according to the Federal Reserve Bulletin, it actually went down to either 6 or 6-1/4% for a brief period commencing in mid-September, 1968,^{6/} rising to 7% at the beginning of the year, 7-1/2% in mid-March, 1969 and then 8-1/2% on June 9, 1969. But, as indicated above, the prime rate was not the true cost of money during this period, but a rarely obtainable floor. Fixing the refund interest rate on the basis of a moving prime rate thus will not provide objectivity or prevent a possible windfall for customers. It will, instead, ensure a profit for AT&T.

15. Accordingly, we believe that the Commission should fix the rate of interest on any refunds to be ordered in this docket at no less than 8.5%. We note that this is the rate of interest which has been fixed by the Federal Power Commission in its recent orders suspending for hearing various pipeline rate increases.^{7/}

IV. The Commission Should Specify That
Interest on Refunds Should be Compounded
Monthly.

16. As we have indicated, given rate increases of the magnitude of the ones involved in this proceeding, and the inevitable (as well as the avoidable) delays in determining proceedings of this complexity, the

^{6/} The "split" prime rate, reflecting a rare disagreement between major banks, merely illustrates the difficulty in attempting to determine the appropriate interest rate by evidence at a hearing.

^{7/} See Manufacturers Light & Heat Company, et al., FPC Docket Nos. RP69-16, et al., Order of August 9, 1969, reconsideration denied September 16, 1969; Consolidated Gas Supply Corporation, FPC Docket Nos. RP69-19, et al., Order of August 4, 1969, Reconsideration denied September 16, 1969.

potential interest obligations will be very large indeed. Accordingly, unless the Commission also prescribes that any interest on the refunds paid by the carrier be compounded, it will be enriched by a free loan of the accumulated interest on the money subject to refund and Telpak users will, conversely, be deprived of the use of the accumulated interest. As the Federal Power Commission recently stated in ordering compounding of interest in rate increase costs (Order No. 362), Changing the Method of Computing Interest to be Paid on Refunds Under the Natural Gas Act, 39 FPC 412, (1968):^{8/}

^{8/} This order was subsequently set aside on procedural grounds, because the Commission had chosen to proceed by general rule but had failed to comply with the provisions of Section 4 of the Administrative Procedure Act. Texaco, Inc. v. FPC, 412 F.2d 740 (C.A. 3, 1969). The court expressed no opinion on the merits of the rule itself or the substantive power of the Commission to adopt it. The Commission had argued that notice of proposed rule making was "unnecessary" since it could have adopted the same requirement on an ad hoc basis in its several accounting orders. The Court responded that "the crucial fact is that the Commission elected to proceed in this case by making a general rule, and when engaged in rulemaking, it must comply with the procedural requirements" of the Administrative Procedure Act.

On Remand, the Commission initiated a new rulemaking proceeding, presently outstanding, looking towards reinstatement of the compound interest requirement. See 34 F.R. 16128 (October 17, 1969). In so doing it made clear that it was proposing to act by rule insofar as compounding of pipeline interest requirements are concerned -- despite the fact that it proposed to continue the consistent previous practice of specifying the rate of interest in pipeline cases on an ad hoc basis -- because "a number of recent orders in individual pipeline cases have specified that the compounding of any refunds, is subject to the further proceedings in this docket".

The Commission has determined that the purpose of requiring interest on excess revenues ordered to be refunded will be better served if compound rather than simple interest is paid. When simple interest is imposed, the company receives an interest-free loan of the accumulated interest on all funds which are advanced by its customers and later ordered to be returned to them. The value of this interest-free loan mounts with the duration of the period in which the increased rates are in effect subject to refund. The Commission believes that this benefit should be eliminated and that customers should be reimbursed for the full period of the company's use of the interest on their advances as well as for its use of the principal. The amendment herein adopted will accomplish this purpose by requiring the interest to be compounded on a monthly basis. We select monthly compounding because the industry bills monthly. (Emphasis added)

17. The same considerations are applicable here and should be followed by the Commission. For unlike an ordinary borrower who must pay interest at stated intervals while a loan is outstanding, AT&T will not have to pay any interest here until the proceeding is terminated and refunds ordered. Telpak users, on the other hand will be required, directly or indirectly, to compound their interest obligations on any money borrowed to pay the increased rates. Nor is there any substantial question of the authority of the Commission to direct that any interest payments be compounded monthly, pursuant to the provisions of Section 4(i) of the Act authorizing it to ". . . perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions." See, United States v. Southwestern Cable Co., 392 U. S. 157 (1968); General Telephone Company of California v. FCC, _____ U. S. App. D. C. _____, 413 F.2d 390, certiorari denied, _____ U. S. _____ (1968).

WHEREFORE, in light of the foregoing, AIA respectfully requests that the Commission amend its order to provide that AT&T be required to pay 8-1/2% interest, compounded monthly from the date on which collection begins, on any refunds determined to be due AIA and other Telpak users.

Respectfully submitted,

AEROSPACE INDUSTRIES ASSOCIATION OF
AMERICA, INC.

By /s/ Arthur Scheiner
Arthur Scheiner

By /s/ Richard A. Solomon
Richard A. Solomon

By /s/ Daniel F. Collins
Daniel F. Collins

Its Attorneys

Of Counsel:
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1343 H Street, N. W.
Washington, D. C 20005

November 19, 1969

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of)	
	:	
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,)	
LONG LINES DEPARTMENT	:	
)	
Revisions of Tariff F.C.C. No. 260, Private	:	Docket No. 18128
Line Services, Series 5000 (Telpak))	
	:	
Proposed Further TELPAK Rate Increases,)	Transmittal No. 10609
Tariff F.C.C. No. 260, Series 5000 Service	:	
)	

To: The Commission En Banc

OPPOSITION TO PETITION FOR
RECONSIDERATION OF "AIRLINE-INDUSTRY PARTIES"

The Western Union Telegraph Company (Western Union), pursuant to Section 1.106(g) of the Commission's Rules and Regulations, opposes the Petition for Reconsideration filed in the above-captioned matter on November 18, 1969. In support hereof, Western Union respectfully states as follows:

I.

As noted in the aforementioned Petition for Reconsideration (page 1), Petitioners complain that the Commission did not grant their petition to reject the subject TELPAK rate increases recently filed by AT&T and other Bell System companies (Bell). In summary, Petitioners assert in their Petition (page 4) that their "concern is directly and primarily with the propriety of tying a substantial part (87 million

dollars) of the over-all revenue reduction to an increased level of rates for specific classes of service such as Telpak* * *." The implication is (see pp. 5 and 6 of Petition) that the Commission has prejudged the proper level of the TELPAK rates.

II.

Clearly, the Petition for Reconsideration should be denied. At the outset, it should be perfectly apparent that the Commission has not prejudged the proper level for TELPAK rates. That level will be the subject of an evidentiary hearing at which all parties will have an opportunity to present evidence. The decision of the Commission will be predicated upon the record made in such hearing, and that decision will stand or fall on the basis of that record. Indeed, we submit that there is no more prejudgment involved in the Commission's Order here involved, than there is in the action of the Commission suspending a rate increase rather than permitting it to go into effect without hearing. In short, Petitioners will be afforded all the rights to which they are entitled constitutionally and by statute.

III.

Petitioners' contention that the \$87 million rate reduction involves "tying" such rate reduction "to an increased level of rates for specific classes of service such as Telpak," is equally devoid of merit. To be sure, the \$87 million dollar "second-step" reduction is to take

place on February 1, 1970, when certain rates now under suspension become effective. But the fact is that Bell has patently assumed the risk of making an \$87 million rate reduction without knowing whether or not the offsetting increases referred to above will be allowed by the Commission in whole or in part. Petitioners, on the other hand, would deny the toll-using public of an \$87 million rate decrease until the proper level of the TELPAK rates are finally determined. Since the risks involved in such rate reduction are Bell's, and since Petitioners are protected by an accounting order, to accede to Petitioners' request* would clearly not be in the public interest.

WHEREFORE, in view of the foregoing, the aforementioned
Petition for Reconsideration should be denied.

Respectfully submitted

THE WESTERN UNION TELEGRAPH CO.

Jack Werner
/s/ Jack Werner

✓ Jack Werner

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John M. Scorce
/s/ John M. Scorce

John M. Scorce

60 Hudson Street
New York, N. Y. 10013

Its Attorneys

*Assuming arguendo that the Commission has authority to reject a rate increase filing which meets the Commission's rules.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of)

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,)
LONG LINES DEPARTMENT)

DOCKET NO. 18128

Revisions of Private F.C.C. No. 260, Private)
Line Service, Series 5000 (TELPAK))

To the Commission

OPPOSITION TO MOTION OF AEROSPACE INDUSTRIES ASSOCIATION
OF AMERICA, INC. TO AMEND ORDER PROVIDING FOR SUSPENSION OF
AMERICAN TELEPHONE AND TELEGRAPH COMPANY'S INCREASED RATE
FILINGS FOR ITS PRIVATE LINE SERVICES, SERIES 5000 (TELPAK).

The Western Union Telegraph Company (Western Union) hereby
opposes the Motion of Aerospace Industries Association of America, Inc.
(AIA) to amend order providing for suspension of American Telephone and
Telegraph Company's increased rate filings for its private line services,
Series 5000 (TELPAK), filed on November 19, 1969. In support hereof, it
is respectfully shown as follows:

I.

The aforementioned Motion of Aerospace requests (p. 15) the
Commission to require the payment of 8 1/2% interest, compounded monthly,
"on any refunds determined to be due AIA and other Telpak users," in the
captioned proceeding. Since Western Union also furnishes Telpak service,
it obviously has an interest in the action of the Commission on the Motion.

-2-

II.

There can be no doubt that by virtue of Section 204 of the Communications Act of 1934, as amended, the Commission has authority to require interest to be paid on refunds properly ordered by it under that Section. However, under the circumstances of this proceeding and the proceedings leading up to it, we oppose, for the reasons discussed below, the issuance of the amendment requested.

III.

Under the circumstances of this proceeding and the proceedings leading up to it, it could prove highly inequitable to grant the subject Motion. Telpak A and B users (many of whom are now Telpak C and D users) enjoyed low discriminatory rates for a considerable period of time before such rates were declared unlawful by the Commission (38 FCC 370 (1964), 37 FCC 111 (1964), 38 FCC 761 (1965), aff'd 377 F.2d 121 (1967), cert. denied 386 U.S. 943 (1967)). And in the same proceeding the Commission concluded that it was unable to determine that the rates for Telpak C and D were compensatory. It is, of course, theoretically possible that the Commission might order refunds in the instant proceeding. But, it is also possible, that equitable considerations may very well warrant the Commission in not requiring any interest to be paid. This is particularly so if the pre-February 1, 1970 rates are found by the Commission not to have been compensatory. Surely, in the light of the history of Telpak rates, the Commission should not prejudge the interest question by acceding to Movant's request at this time.

We respectfully suggest, therefore, that the matter of interest, if any, and the level thereof, be determined at the time of the issuance of the final decision in the instant proceeding.

Respectfully submitted,

THE WESTERN UNION TELEGRAPH CO.

Jack Werner
/s/ Jack Werner
Jack Werner

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Its Attorneys

November 28, 1969

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
AMERICAN TELEPHONE AND TELEGRAPH) Docket No. 18128
COMPANY, LONG LINES DEPARTMENT) Transmittal No. 10609
) October 1, 1969
Revisions of Tariff F.C.C. No. 260, Pages)
1, 81, 84, 85, 86, Private Line Services)
Series 5000 (TELPAC))
)
To: The Commission

COMMENTS OF AEROSPACE INDUSTRIES
ASSOCIATION OF AMERICA, INC.,
CONCERNING PETITION FOR RECONSIDERATION

Aerospace Industries Association of America, Inc. ("AIA"), by its attorneys, submits herewith its comments concerning the petition for reconsideration filed in this Docket on behalf of the Airline Industry Parties on November 19, 1969. In brief, it is the position of AIA that the Commission should act on the petition as soon as feasible and in any event not later than January 2, 1970. To defer action beyond that date may impose avoidable procedural complications on, or delay, judicial review of the Commission's Memorandum Opinion and Order of October 29, 1969 (FCC 69-1210), if such review should be required and would impose unnecessary additional burdens upon the affected parties and the courts.

1. In order to place this matter in perspective, it will be helpful to review the position previously urged in these proceedings

by AIA. In prior pleadings ^{1/} AIA contended that the proposed revisions of AT&T Tariff F.C.C. No. 260, accompanying Transmittal No. 10609 of October 1, 1969 and aimed at putting into effect a second round of increases in rates and charges for Telpak (Series 5000) services, should be rejected as unlawfully filed or that the effective date should be stayed until such time as the Commission issues a final decision following a hearing on the legality of existing "interim" and proposed rates and charges for Telpak services. In summary, the grounds for AIA's contention were that the current Telpak rate increases were instituted in violation of the procedures which the American Telephone and Telegraph Company ("AT&T") agreed to follow in the stipulation it entered into which resulted in the termination of Phase 1-B of Docket No. 16258 (FCC69-892; 18 F.C.C. 2d 761, July 29, 1969); that in view of the failure of the Commission to accord Telpak users the expedited and preferred hearing to which they are entitled under Section 204 of the Communications Act with respect to the interim Telpak rate increases instituted in 1968, it would be arbitrary, capricious and an abuse of discretion for the Commission to fail to use its powers under Sections 4(i), 303(r) and

^{1/} See Petition to Reject Further Telpak Rate Increases or for Alternative Relief filed October 10, 1969; and Reply of Aerospace Industries Association of America, Inc., filed October 27, 1969.

203(b) of the Act to delay the new rate increases from becoming effective pending the issuance of a final order, following a hearing on the legality of the present (interim) and proposed new Telpak rates; and that the failure to take the action requested by AIA would cause irreparable injury to Telpak users and to the public interest, but that the grant of the relief requested would not, in the circumstances, cause comparable injury to AT&T.

2. In its Memorandum Opinion and Order (FCC69-1196) issued in these proceedings the Commission concluded that it was unable to determine that the charges, classifications, regulations and practices contained in the Telpak revised schedules are or will be just and reasonable or otherwise lawful. It suspended such proposed tariff changes until February 1, 1970, designated these questions for hearing and provided for an accounting order. In all other respects the Commission denied the petitions of AIA and others for rejection or stay of the tariff. The basis for such denial was stated by the Commission as follows:

"10. We now address ourselves to petitioner's requests for extraordinary relief and oral argument. We fail to perceive in petitioners' pleadings sufficient circumstances that would require the extraordinary remedies they seek, or any benefit that would accrue at this point, by granting the petitioners' request for oral argument. We have previously responded to petitioner's contention that we possess plenary power pursuant to

Section 4(i), and 303(r) of the Communications Act of 1934, as amended, to accord the requested relief, in our Order adopted August 28, 1968, 14 FCC 2d 564, and find no reason to disturb our conclusion reached therein. As to petitioners' conclusion that Section 203(b) of the Communications Act of 1934, as amended, conveys sufficient authority to defer the effective date of the proposed tariff revisions in Telpak, it suffices to say that we find no necessity for the imposition of such extraordinary relief. However, we are not deciding at this time the extent of our authority to grant the kind of relief petitioners request." (Emphasis supplied.)

The Commission gave no reasons, however, for its conclusion that "no necessity" exists for granting the relief requested by AIA and other parties.

3. The aforesaid decision of the Commission was adopted on October 29, 1969, and released on November 6, 1969. In the interim, on November 5, 1969, the Commission released its public notice (FCC 69-1210) which bears the caption "Rates for Interstate Long Distance Calls to be Reduced". There the Commission recited that ". . . AT&T has previously agreed to file reductions [in MTT rates] of about \$87 million representing an offset to increases in revenues resulting from higher rates recently filed for program transmission, Telpak and teletypewriter exchange (TWX) services when the latter increases become effective."

Accordingly, for the first time ^{2/} it was made clear to the Telpak users that the Commission and AT&T had "agreed" in private discussions that revenues derived from increased charges to one class of customers would be used to reduce charges to another class. The language of the public notice is explicit and unequivocal -- it states that "AT&T has previously agreed." ^{3/}

AIA and its member companies neither participated in nor were given an opportunity to participate in the discussions which led to the agreement. Moreover, the agreement was entered into by the Commission in the face of its prior statement that ". . . the company [AT&T] has stated it seeks no rate increases" See the Commission's letter order of September 17, 1969 (Report No. 3789, September 19, 1969), rejecting a request

^{2/} In his letter to the Commission of October 1, 1969, accompanying Transmittal No. 10609, F.M. Garlinghouse, Vice President of AT&T, estimated that the "adjustments" for interstate television and audio transmission, Telpak and TWX services

" . . . would increase the Bell System's interstate revenues by approximately \$87 million on an annual basis. In accordance with our discussions from time to time with Commission representatives, it is our intention to offset this revenue increase by adjustments in the rates for interstate message toll telephone service (MTT) and wide area telephone service (WATS)."

This language refers only to "discussions", not to an "agreement", and to "our" [i.e., AT&T's] intention". Accordingly, the language is wholly consistent with unilateral action by AT&T.

^{3/} The details of the negotiating positions, and the successive positions taken by the parties (AT&T and the Commission) are further set forth in Commissioner Johnson's dissent to the Commissions' action.

of the Commissioner of the New York City Department of Consumer Affairs to intervene in the AT&T surveillance proceedings.

4. The issuance of the public notice of November 5, 1969, made it clear that, as a consequence of private discussions between the Commission and AT&T representatives -- discussions to which those adversely affected were not privy -- an agreement was made to increase charges to one class of customers and to confer the benefits of the increase on another class by decreasing the rates charged that class. The exact nature of the agreement is not yet clear. The Telpak rate increase is, of course, subject to refund with interest. Since AT&T has not yet filed its promised offsetting decrease, we do not know to what extent the decrease will be tied to the ultimate outcome of the proceedings in this Docket. However, since the public notice makes clear that the Commission is in "agreement" with AT&T that it would not be unreasonable for AT&T to earn on its overall interstate business the return indicated, taking into account the higher Telpak rates as offset, it would appear that the Commission has "agreed" in advance of the hearing in this Docket that any decision in favor of the Telpak users will deprive AT&T of revenues to which it is entitled. How we as users can hope to receive fair consideration of our claims under those circumstances, is difficult to see.

5. The public notice, therefore, presented an additional and independent ground for AIA's contention that it would be an abuse of discretion for the Commission to fail to use its statutory powers to prevent the Telpak rate increases from going into effect pending a hearing and final decision concerning the legality of the present (interim) and proposed new Telpak rates. It is now clear that without in any way consulting or hearing interested users, such as the AIA member companies, the Commission "agreed" to, i.e., participated in a decision to, increase the charges such users would have to pay. The fundamental illegality of such agency action needs no elaboration.

6. It may be suggested that the public notice was erroneous, and that a formal "agreement" was not in fact reached. This would not be a critical consideration. At a minimum it is clear from the relevant documents that the latest Telpak increase was not the result of a unilateral and independent business decision by AT&T. Rather AT&T reached the decision to offset reduced revenues from MTT service by increased revenues from Telpak only after discussion with Commission representatives and receiving an indication that such action would be favorably viewed. Commission participation and approval is therefore obviously involved even if a description of the process as an "agreement" may be contended to be technically inaccurate.

7. Prior to the receipt of the Airline Industry Parties petition for reconsideration, AIA had authorized judicial review of the Commission's Memorandum Opinion and Order adopted October 29, 1969, and released November 6, 1969 (FCC 69-1196). In our view, the disclosure of the Commission's participation in AT&T's decision to increase Telpak rates merely constitutes an additional ground for error which could appropriately be called to the attention of a reviewing court. However, the petition for reconsideration filed on November 18, 1969, by the Airline Industry Parties affords the Commission itself an opportunity to correct its error. While not joining in that petition, AIA believes it would be wholly appropriate for the Commission to take such corrective action. On the other hand, AIA must emphasize that the existence of an unacted-upon petition for reconsideration may impose needless procedural complications on, and delay, judicial review. As a matter of fairness to the courts, to the Commission and to the parties affected, these consequences should be avoided. Accordingly, it is respectfully requested that the Commission act on the petition for reconsideration at the earliest possible time and that in no event should such action be delayed beyond January 2, 1970. This would provide

the very minimum period needed for appropriate consideration
by the courts -- if consideration should be necessary.

Respectfully submitted,

AEROSPACE INDUSTRIES ASSOCIATION
OF AMERICA, INC.

Of Counsel:

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By /s/ Arthur Scheiner

293-7800

/s/ Harold F. Reis
Harold F. Reis

November 28, 1969

Its Attorneys

American Telephone and Telegraph Company
Long Lines Department
Revisions of Tariff F.C.C. No. 260
Private Line Services, Series 5000
(Telpak)

OPPOSITION TO PETITION FOR RECONSIDERATION

1. Petitioners request the Commission to reconsider its Memorandum Opinion and Order (FCC 69-1196) released November 6, 1969, insofar as it denied Petitioners' request to reject or require or secure withdrawal of the TELPAK rate increases filed October 1 with AT&T Transmittal No. 10609. As grounds for such reconsideration Petitioners allege that

in conducting and concluding the recent surveillance proceedings on AT&T's overall rate of return the Commission has somehow prejudged the issues in Docket No. 18128, the proceeding which will determine the lawfulness of these TELPAK rates. It appears to be Petitioners' position that by noting AT&T's stated intention to make adjustments in the rates for MTT service calculated to offset the revenue increases estimated to result from the effectuation of the rate revisions for TELPAK, TWX and Program services filed with Transmittals Nos. 10609, 10610, 10563, and 10596 the Commission has, in effect, determined that such revisions are appropriate, thus prejudging not only those issues, but also other issues in Docket No. 18128 regarding the compensativeness of the original TELPAK C and D rates and the "interim" TELPAK C and D rates which became effective September 1, 1968.*

2. Thus, at the core of Petitioners' argument is the assertion that by noting the commitment by AT&T to make offsetting adjustments to rate filings in the non-MTT services the Commission is "locked-in" to finding those rate filings appropriate. In fact no such conclusion can be deduced or even remotely inferred from the actions of the

* AT&T has elsewhere made clear its view that a determination as to the compensativeness of prior TELPAK rates is neither necessary nor significant to a Commission determination of the lawfulness of the proposed TELPAK rate revisions. See AT&T's "Response to Petition for Consolidation" dated April 9, 1968 in Dockets Nos. 16258 and 17457, para. 7.

Commission alleged to show such prejudgment. The Commission's "action" of November 5, 1969 (FCC 69-1210), in noting the rate reductions in the MTT service agreed to by AT&T merely points out the previous agreement by AT&T* to this effect. Such "action" in no way binds the Commission to any future action concerning the issues in Docket No. 18128. To the extent that the October 1 TELPAK rates or the revised TWX or Program rates, may be found ultimately to be excessive there is nothing to prevent the Commission from ordering the filing of revised rates and the refund of amounts unlawfully collected prior thereto, and there is nothing in the Commission's conduct of the continuing surveillance proceedings which could in any way compromise its ability to make such findings or orders. The question whether lower TELPAK rates or refunds, if any such are ordered, would significantly affect AT&T's overall rate of return or would justify compensating rate increases for other services is purely speculative. In short, the results of the continuing surveillance proceedings do not afford the slightest basis for inferring a predilection or prejudgment on the part of the Commission with respect to the TELPAK issues in Docket No. 18128. We believe the Commission must be taken at its word when it states that it was not able to determine the lawfulness of the TELPAK rates filed October 1, 1969 and suspended those rates for the

* See Mr. Garlinghouse's letter to Mr. Waple dated October 1, 1969.

full three months' statutory period. (Para. 11, Memorandum Opinion and Order released November 5, 1969) (FCC 69-1196.)

3. Even if Petitioners' allegations were accepted, arguendo, it is a non sequitur to conclude that the relief requested by Petitioners is appropriate. As we pointed out in our Opposition dated October 24, 1969, even if the Commission had the power to grant the extraordinary relief requested by Petitioners and other TELPAK users, the circumstances do not justify the grant of such relief. This position was adopted by the Commission in the November 5 Memorandum Opinion and Order (para. 10). Nothing in the argument now put forth by Petitioners alters the situation in which the Commission denied the relief earlier requested.

WHEREFORE, the aforesaid Petition for Reconsideration should be denied.

Respectfully submitted,

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

By /s/ C. Duane Aldrich
C. Duane Aldrich

By /s/ Alfred A. Green
Alfred A. Green

195 Broadway
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Its Attorneys

December 2, 1969

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of)

American Telephone and Telegraph Company)
Long Lines Department)

Docket No. 18128

Revisions of Tariff F.C.C. No. 260)
Private Line Services, Series 5000)
(Telpak))

OPPOSITION

American Telephone and Telegraph Company (AT&T), pursuant to § 1.45(a) of the Commission's Rules, herewith opposes the "Motion of Aerospace Industries Association of America, Inc., to Amend Order Providing for Suspension of American Telephone and Telegraph Company's Increased Rate Filings for Its Private Line Services, Series 5000 (TELPAC)" (Motion) dated November 19, 1969, and in support of such opposition respectfully states as follows:

1. In its Motion Aerospace Industries Association of America, Inc. (AIA) asks that the Commission's prior orders* herein which, inter alia, subjected the revenues from TELPAK rate increases now under investigation in this proceeding to an accounting requirement and possible subsequent refund, be amended so as to specify that AT&T be required to pay at least 8 1/2 percent interest, compounded monthly on any such refunds which may be ordered.

* Memorandum Opinion and Order of July 10, 1968 (13 F.C.C.2d 853) and Memorandum Opinion and Order of October 29, 1969 (FCC 69-1196, released November 6, 1969).

2. AIA's Motion should be denied as premature since it raises issues with which the Commission should deal only at the time of a final order in this proceeding. The Communications Act does not require the Commission to order refunds. Section 204 of the Act provides that after investigation the Commission may require refunds, with interest, of such portion of the increased charges under investigation as are found to be unjustified. This confers a discretionary authority on the Commission not only as to whether refunds are to be ordered, but also, if ordered, whether, and on what terms, interest on such refunds is to be paid. Clearly the appropriate time for the exercise of such discretionary authority is at the time the Commission makes its findings with respect to the propriety of the rates under investigation.

3. This proceeding involves a general investigation of all of AT&T's private line services other than program services. It is possible that the Commission's final determinations herein might include the prescription of new rates, some of which might be lower, and some higher, than those proposed by AT&T, or now in effect. In such circumstances there would be no opportunity for AT&T to collect additional amounts from those customers whose charges were too low during the period of investigation. This inability of the carrier to recoup from those customers whose rates are found to have

been too low may properly be considered by the Commission in determining the extent to which the ordering of refunds is proper, and whether interest on such refunds should be imposed. This Commission's decision not to impose any interest on the refunds ordered in the Private Line Case (Docket No. 11645) clearly appears to have been based upon a balancing of such equities. 34 F.C.C. 1094, 1096.

4. Moreover, even if the payment of interest on refunds were found to be appropriate, it is obvious that a determination of the proper rate can best be made retrospectively rather than prospectively. In short, the Commission should withhold the exercise of its discretion as to the terms under which refunds, if any, should be made until all of the facts needed for an informed judgment are available.

WHEREFORE, AIA's Motion should be denied.

Respectfully submitted,

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

By /s/ C. Duane Aldrich
C. Duane Aldrich

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Its Attorney

December 3, 1969

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
AMERICAN TELEPHONE AND)	
TELEGRAPH COMPANY)	DOCKET NO. 18128
Long Lines Department)	
Revisions of Tariff F.C.C. No. 260,)	
Private Line Services, Series 5000)	
(TELPAK))	
)	
To: The Commission		

REPLY TO AT&T OPPOSITION TO MOTION
OF AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA,
INC. TO AMEND ORDER TO SPECIFY THE RATE OF INTEREST

On November 19, 1969, Aerospace Industries Association of America, Inc. ("AIA"), petitioned the Commission to amend its orders in this proceeding of July 10, 1968 and October 29, 1969, to specify that the American Telephone and Telegraph Company ('AT&T') be required to pay 8-1/2% interest, compounded monthly from the date on which collection begins, on any refunds determined to be due to AIA member companies and other Telpak users. The opposition to the AIA motion as "premature" filed by AT&T on December 3, 1969,^{1/} is as irrelevant as it is revealing of the comparative equities involved in a decision whether to permit the Telpak rate increases to go into effect before their legality is determined.

^{1/} The Opposition filed by The Western Union Telegraph Company is substantially to the same effect.

1. AIA's motion was made in full recognition of the fact that at the conclusion of the proceedings there conceivably might be no refunds ordered; in which case, of course, the question of interest thereon would no longer exist. It was AIA's position that in order to advise all parties of the extent and nature of their potential obligations (albeit contingent ones) and in order to avoid quite unnecessary and fruitless additional hearing proceedings, the Commission could and should follow the precedent of its sister agency which handles a greater volume of rate increase cases and specify the rate of interest at the outset of the proceeding. Typically, AT&T has not bothered to discuss these considerations. Rather, it has pursued the route of avoidance.

2. Significantly, AT&T carefully refrains from conceding that if, as it urges, the Commission defers all consideration of interest matters until "the time of a final order in this proceeding" it will be able to order interest at that time without further proceedings as to the rate of interest and whether it should be compounded. It is obvious, therefore, that, AT&T has not even attempted to meet AIA's arguments.

3. We cannot, however, allow the irrelevance of AT&T's opposition to our motion to pass without bringing to the Commission's attention the former's discussion of the availability of any interest or refunds in the event that the Telpak users prevail in the hearing in Docket

No. 18128. AT&T's discussion once again makes clear the basic impropriety and illegality of the Commission's action permitting the most recent Telpak rate increase to become effective pending determination of the long-delayed Telpak rate proceedings. AT&T's position, with which we strongly disagree, is that it may unilaterally raise certain rates and then, if after suspension and hearing the increase has been held to be invalid in whole or part, refrain from making refunds to the customers who were the victims of its illegal action because other customers conceivably may have been found to have been undercharged. (But see Federal Power Commission v. Tennessee Gas Transmission Co., 371 U.S. 145 (1962)). This is the very vice which AIA, among others, has previously pointed out in the ex parte agreement between AT&T and the Commission whereby AT&T "agreed"^{2/} to offset the most recent Telpak rate increases by an equivalent reduction in its MTT rates even though this reduction is itself not subject to recoupment. It is now clear that AT&T intends to rely upon this illegal agreement as justification for avoiding any refunds or interest properly owed to Telpak users.

^{2/} AT&T's Opposition to the petition of the Airline Industry Parties for reconsideration filed on December 2, 1969, admits (p. 3) "the previous agreement by AT&T to this effect".

We therefore suggest the Commission give full consideration to this development in its consideration of the pending petition for reconsideration.

Respectfully submitted,

AEROSPACE INDUSTRIES ASSOCIATION
OF AMERICA, INC.

By /s/ Arthur Scheiner
Arthur Scheiner

/s/ Richard A. Solomon
Richard A. Solomon

/s/ Daniel F. Collins
Daniel F. Collins

Its Attorneys

OF COUNSEL:

Wilner, Scheiner & Greeley
2021 L Street, N.W.
Washington, D.C. 20036

December 5, 1969

Before The
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
LONG LINES DEPARTMENT

DOCKET No. 18128

Revisions of Tariff F.C.C. No. 260, Private
Line Services, Series 5000 (TELPAK)

PETITION OF PENN CENTRAL TRANSPORTATION COMPANY
FOR RECONSIDERATION AND CLARIFICATION OR
MODIFICATION OF ACCOUNTING ORDER

Comes now Penn Central Transportation Company¹
and respectfully petitions that the Commission reconsider
its order released November 6, 1969 (FCC 69-1196), and
clarify or modify (if necessary) that portion of paragraph
15 of said order requiring respondents to "keep accurate
account of all amounts received by reason of such increase."
If upon reconsideration the Commission determines that
clarification or modification of said order is warranted,
this petitioner respectfully suggests that similar clarifi-
cation or modification of the order released July 16, 1968

¹ The name of petitioner was formally changed October 1,
1969; immediately prior thereto it was known as Penn
Central Company; prior to May 8, 1968 it was known as
Pennsylvania New York Central Transportation Company.

(FCC 68-711) should be made with respect to the identical language appearing in the fourth ordering paragraph of the latter order. In support of this petition Penn Central Transportation Company states as follows:

1. Petitioner is a common carrier by rail engaged in the transportation of freight and passengers in sixteen states, the District of Columbia and Canada. Petitioner uses extensively the private line services and facilities, particularly Series 5000, offered by respondents. Substantial portions of the ~~common~~ common carrier communication facilities and services utilized by this petitioner are shared with other rail common carriers.

2. Petitioner was granted leave to intervene in this proceeding by this Commission's order released February 12, 1969 (FCC 69M - 179).

3. In the "Petition for Suspension and Investigation, and for Imposition of an Accounting Order" filed by this petitioner October 15, 1969 the Commission was urged to consider the unique character of the TELPAK service offering and that the accounting order properly should recognize the problem incident to an accounting by reason of the impact of sharing privileges, the changes in the equivalency ratio and the probable spill-over of channels now available under TELPAK service into inter-exchange channels. Petitioner asked that this Commission permit timely pleadings addressed to this question before acting upon the form of the accounting order.

4. By this Commission's order released April 12, 1968 (FCC 68-388) the Commission indicated that it preferred such procedure by the statement in paragraph 7 of said order. On July 9, 1968 this petitioner filed such a pleading which obviously was received by the Commission too late for consideration before the original accounting order was adopted on July 10, 1969 (FCC 68-711).

5. The requirement of the accounting orders that respondents account for "all" amounts received by reason of the successive increases and changes in the equivalency ratios may be sufficiently broad to encompass increased charges incurred for services, required by petitioner, including inter-exchange channels, necessitated by reconfiguration of TELPAK sections due to changes in the voice-teletypewriter equivalency ratios. However, the increased charges to be imposed on this petitioner alone will likely amount to millions of dollars before the issues in this proceeding are finally determined. It will be of benefit both to respondents and to all private line service users to know with certainty the meaning and intent of the accounting orders, particularly since the effect of the changes in the regulations in the tariffs under investigation (e.g., equivalency ratio) compel TELPAK users to purchase alternate private line service offerings, the rates and charges for which apparently also were brought within the scope

of this investigation by paragraph 10 of the order released July 16, 1968 (FCC 68-711).

6. Petitioner set forth in its petition dated July 9, 1968 in considerable detail the nature of the difficulties with which it, other consumers, and respondents will be confronted in complying with the accounting order if the rates under investigation are not found to be just, reasonable, and lawful in all respects. For convenience a copy of said petition is attached hereto, marked Appendix A, and incorporated herein by reference.

7. The situation will become much more acute on February 1, 1970 when the proposed increases and changes in regulations submitted in Transmittal No. 10609 become effective. The 2:1 telegraph channel equivalency ratio will compel major reconfiguration of TELPAK groupings. Some routes formerly requiring a D section may be satisfied with a D and C section. In some cases services offered by respondents other than the Series 5000 service will be required. In fact some of petitioner's routes already have been converted to inter-exchange channels. Petitioner anticipates that effective February 1, 1970 it will be less costly for petitioner to convert other routes to inter-exchange channels rather than utilize TELPAK service. To the extent that inter-exchange channel rates are more costly than TELPAK channels were prior to Transmittals 10069 and

10609, it is conceivable that during the period of investigation contemplated in this docket petitioner will pay to respondents for communication services substantial amounts over and above that which would have been required for TELPAK configurations based upon the rates and regulations ultimately found lawful in this proceeding.

8. It is the intent of section 204 of the Communications Act to prevent respondents from possible unjust enrichment pending the instant investigation. Clearly the accounting order should not be limited in its application to the Series 5000 tariffs and the Commission's accounting order should be clarified or modified so that it is not susceptible to such an interpretation.

9. Petitioner considers that §207 of the Act provides neither a satisfactory nor an adequate remedy in the premises. Pending a final determination of the issues in Docket 18128 petitioner would be unable to specify with any degree of particularity the nature and extent of damages suffered by reason of the increases imposed by Transmittals 10069 and 10609. Moreover, the limitation imposed by §415 of the Act would require suits or complaints by all TELPAK users to be filed at least once every year during the pendency of Docket 18128. Such multiplicity of actions should be avoided if at all possible. Petitioner submits that clarification or modification of the accounting order will obviate the necessity for a multiplicity of suits.

10. This petitioner will not expect the respondents to assume the sole burden of the accounting process in the event the tariff schedules under investigation are found to be unlawful. This petitioner proposes to keep detailed records of the channels used by it that could have been included in TELPAK sections, assuming the voice-teletypewriter equivalency ratio were 12:1 or 6:1. From such data it will be possible to calculate the number of TELPAK sections that would have been required regardless of the equivalency ratio found to be lawful by this Commission.

WHEREFORE petitioner urges that the Commission reconsider its order released November 6, 1969 (FCC 69-1196) that it clarify the meaning of the requirement that respondents "keep accurate account of all amounts received by reason of such increase," and that, if deemed necessary, the Commission modify said order so as to make clear that the obligation to account extends not only to Series 5000 service but also to other alternative service offerings of respondents into which there may be spill-overs by reason of the successive changes in the voice-teletypewriter equivalency

ratios. To the extent appropriate, petitioner suggests that the order released July 16, 1968 (FCC 68-711) also be clarified or modified.

Respectfully submitted,

Kenneth H. Lundmark
Attorney for
Penn Central Transportation
Company
466 Lexington Avenue
New York, New York 10017

Dated: December 5, 1969

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FILED BY
COHN AND MARKS

DEC - 8 1969

FEDERAL COMMUNICATIONS
COMMISSION

5922

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH
COMPANY, LONG LINES DEPARTMENT

DOCKET NO. 18128

Revisions of Tariff FCC No. 260,
Private Line Services, Series 5000
(TELPAK)

PETITION OF ASSOCIATION OF AMERICAN RAILROADS FOR RECONSIDERATION

The Association of American Railroads (hereinafter "AAR"), by its attorneys, respectfully requests the Commission to reconsider, in part, its Order, FCC-1196, released November 6, 1969, relating to changes in the Telpak tariff filed by American Telephone and Telegraph Company (Transmittal No. 10609). This request for reconsideration is directed specifically to the Accounting Order set forth in Paragraph 15, in which AT&T is required to keep "accurate account of all amounts received by reason of" the increase in Telpak charges contemplated by AT&T's transmittal.

1. Transmittal No. 10609 represents the second Telpak "rate increase" involved in this docket. On March 25, 1968, by Transmittal No. 10069, AT&T submitted tariff material establishing increased rates for Telpak C and D. In addition to the increase in the monthly charges for Telpak service, Transmittal No. 10069 provided for a change in the teletypewriter-voice grade equivalency ratio from 12:1 to 6:1. The changes set forth in Transmittal No. 10069, following suspension by the Commission for the statutory period, became effective September 1, 1968.^{1/}

2. Although the investigation of the Transmittal No. 10069 revisions has not yet begun, AT&T has now filed (October 1, 1969) a second stage of Telpak rate revisions, in Transmittal No. 10609. Again, in addition to increases in the monthly charges for Telpak C and D base capacities, AT&T has further decreased the number of telegraph channels having the equivalent of one voice grade channel, from six to two. The Commission has again suspended these tariff revisions for the statutory period and ordered their investigation.

^{1/} By Order, FCC 68-711, adopted July 10, 1968 and released July 16, 1968, the Commission not only ordered the suspension and investigation of the tariff changes submitted in Transmittal No. 10069, but also adopted an Accounting Order. However, the Commission's Order makes no reference to the Petition filed July 9, 1968 by Penn Central Company for a particular accounting order which appears to be required in the circumstances involved here. This appears to have been the result of unfortunate timing, a problem which, it is hoped, is cured not only by this filing by the AAR but by the contemporaneous filing by the Penn Central Transportation Company.

FCC 69-1196, adopted October 29, 1969 and released November 6, 1969. Furthermore, the Commission ordered the carriers to "keep accurate account of all amounts received by reason of such increases." As was the case with the original Accounting Order respecting the changes filed with Transmittal No. 10069, the Accounting Order involving Transmittal 10609 requires clarification or, perhaps, modification, in light of the effect of the tariff changes.

3. The problem arises by virtue of the fact that the changes in the Telpak tariff, particularly the changes in the teletypewriter-voice grade channel equivalency ratio - which changes have not yet been established to be lawful - may require a user of AT&T's services to order inter-exchange channels the tariffs for which are not, per se, subject to the standard Accounting Order. Examples of the manner in which reconfiguration of Telpak requirements may result in use of inter-exchange channels were provided in the July 9, 1968, Petition of Penn Central Company (Pages 4 to 6) which, for the Commission's convenience, is attached to the Petition of Penn Central Transportation Company, being filed contemporaneously with this Petition of the AAR. In brief, the change in the equivalency ratio may result in users ordering services other than Series 5000 (Telpak) and the Commission's Accounting Order should not be limited to the Series 5000 tariffs. Obviously, the impending change in the equivalency ratio from 6:1 to 2:1, which is slated to become effective February 1, 1970, will

greatly aggravate the problem which resulted from the September 1, 1968 change in the equivalency ratio from 12:1 to 6:1.

4. Clarification or modification of the Accounting Order, respecting the tariff changes submitted both with Transmittal No. 10609 and with Transmittal No. 10069 is necessary to prevent the carriers from reaping an unjust benefit during the present investigation should the Commission ultimately conclude that some or all of the Telpak tariff revisions are not lawful.

5. Clarification or modification of the Accounting Order to ensure the possibility of a refund of charges made for inter-exchange channels used as a direct result of an unlawful Telpak tariff revision will not place an unreasonable burden on the carriers. Each user (and, so long as Telpak sharing continues to be permitted, the railroad zone co-ordinator) can keep records of the inter-exchange channels used by it that would have been included in Telpak sections had the teletypewriter-voice channel equivalency ratio remained at 6:1 or even 12:1. The historical co-operation between the railroads and the carriers regarding the railroads' communications requirements gives assurance that the accounting involved herein can be ^{2/} accomplished to the satisfaction of both parties.

^{2/} The AAR fully agrees with Pen Central Transportation Company (see Paragraph 9 at page 5 of the Penn Central Petition being filed contemporaneously herewith) that inclusion of inter-exchange channels in the Accounting Order for Telpak is preferable to relegating users to the remedies of Section 207 of the Communications Act, which would involve alternate computations of damages and a multiplicity of filings.

On the basis of the foregoing, the Association of American Railroads requests the Commission to reconsider and clarify or modify the Accounting Order set forth at Paragraph 15 of its Memorandum Opinion and Order, FCC 69-1196, released November 6, 1969.

Respectfully submitted

ASSOCIATION OF AMERICAN RAILROADS

By

Roy R. Russo
Cohn and Marks
1920 L Street N. W.
Washington, D. C. 20036
Its attorney

December 8, 1969

CERTIFICATE OF SERVICE

I, Susan M. Shilling, do hereby certify that I have this 8th day of December, 1969, sent by first class United States mail, a copy of the foregoing PETITION OF ASSOCIATION OF AMERICAN RAILROADS FOR RECONSIDERATION to the parties in Docket No. 18128. A copy of the service list is attached to the original of this Petition.

Susan M. Shilling
Susan M. Shilling

12-8

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
LONG LINES DEPARTMENT

Docket No. 18128

Revisions of Tariff F.C.C. No. 260,
Private Line Services
Series 5000 (TELPAC)

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PETITION OF
THE NATIONAL ASSOCIATION
OF MOTOR BUS OWNERS
FOR RECONSIDERATION

Comes now the National Association of Motor Bus Owners (NAMBO), pursuant to Section 405 of the Communications Act of 1934, as amended, and Section 1.106 of the Commission's Rules of Practice and Procedure, and respectfully petitions for reconsideration of the Commission's Memorandum Opinion and Order adopted October 29, 1969 and released November 6, 1969 (FCC 69-1196), insofar as it denied NAMBO's request (as set forth in its petition dated October 17, 1969) that the Commission reject, reschedule the effective date or take other appropriate action to hold in abeyance the TELPAK rate increases filed October 1, 1969 until resolution of all of the various issues relating to the TELPAK offering pending in this proceeding. In support hereof, NAMBO respectfully states as follows:

1. The Commission's Memorandum Opinion and Order released November 6, 1969 (FCC 69-1196) did not discuss the basic contentions made in NAMBO's October 17, 1969 petition nor even

- 2 -

mention the filing itself. Accordingly, NAMBO incorporates its prior pleading by reference in support of this petition for reconsideration.

2. In particular, NAMBO calls the Commission's attention to NAMBO's prior contention that in the present posture of the Commission's various evaluations of A.T.&T.'s interstate rates, the Commission cannot properly permit any interim A.T.&T. rate adjustment other than a downward adjustment. As pointed out by NAMBO, the only determination based on a hearing that the Commission has made to date concerning A.T.&T.'s interstate rates is that, from an over-all standpoint, they have been excessive. Thus in Phase I-A of Docket No. 16258, the Commission found that A.T.&T. was earning an excessive rate of return and ordered that interstate revenues be reduced by \$120 million (FCC 67-776; FCC 67-1047). Despite this, A.T.&T. has continued to earn "well in excess of 8% on interstate operations" (FCC 68-667). "In 1969 interstate earnings are expected to exceed 8%."^{1/} Prior to the recently-announced decreases in MTT rates, A.T.&T. forecast an increase in interstate earnings "to levels above 8.5%" in 1970, and, according to the Commission, even the decreases "will not, in themselves, prevent the Company from achieving earnings in the the aforementioned range."^{2/} In the face of this situation - earnings

^{1/} FCC Public Notice, dated November 5, 1969, announcing A.T.&T-proposed reductions in message toll rates as a result of "continuing surveillance" meetings between the FCC and the Bell System.

^{2/} Ibid.

- 3 -

far in excess of the authorized rate of return even after the "surveillance" decreases - it is clear that the only proper interim rate adjustments in regard to any interstate services are downward adjustments. The Commission has not yet made any determination after hearing which would warrant any other result. Thus no determination has been made as to proper cost allocations as among A.T.&T.'s interstate services. While cost allocation studies have been presented (the 7 Way Cost Study in the Telegraph Service investigation, the Broad Brush Updating of such study in Docket No. 16258 and the 9 Way Cost Study in the same proceeding), none of these studies has ever been tested by cross-examination, nor has there been any adjudication of their validity by the Commission. In such a posture, the regulated carrier is not in a position to press for interim rate increases on particular services to soften the impact of the over-all interim decrease which is required. Cf. F.P.C. v. Tennessee Gas Co., 371 U.S. 145, 152-3 (1962). The effort by A.T.&T. to pile another interim rate increase on the backs of its TELPAK customers when the only adjudication to date has demonstrated an over-all excess in interstate rates is clearly contrary to the Commission's own determinations and patently inconsistent with proper procedures in rate investigations.

3. It should also be recognized that, as pointed out in NAMBO's prior petition, A.T.&T.'s most recent TELPAK rate increase was in large part predicated on a departure from the authorized rate of return, i.e., an increase from the 7% to 7½% range

approved in Docket 16258 to 8½%, a level which has never, formally or informally, been approved by the Commission. This is a further strong reason for the use of extraordinary action by the Commission to prevent the TELPAK increase from becoming effective. Yet the Commission failed even to discuss this matter, just as it failed to discuss the contention concerning the propriety of any interim upward rate adjustments at this time.

4. Moreover, the Commission's Public Notice, announcing the results of the "continuing surveillance" meetings has revealed another important ground for the extraordinary relief requested by NAMBO and other user groups, namely, a clear prejudgment of the instant proceeding. This prejudgment is demonstrated by both the text of the Commission's release and in Commissioner Johnson's Separate Statement. In the release, the Commission refers to MTT rate reductions of \$150 million and \$87 million, the latter "representing an offset to increases in revenues resulting from higher rates recently filed for program transmission, Telpak and teletypewriter exchange (TWX) services when the latter increases become effective." The Commission then gives its blessing to the entire package, stating: "The Commission anticipates that the new rates will permit the companies to achieve earnings in a range needed to attract capital under today's conditions." It is difficult to read such a release in any way other than as an approval of the totality of such adjustments and a resulting prejudgment of this proceeding where the rate increase portion of

the adjustments was supposedly to be impartially evaluated.

5. If there is any doubt about the meaning of the Commission's release, it is dispelled by Commissioner Johnson's Separate Statement which revealed that the total impact of the entire package (i.e., reductions plus increases) was negotiated between the FCC and the Bell System. Thus Commissioner Johnson stated that "the majority [of the FCC] was seeking \$290 million through negotiations conducted by the staff and the Telephone Committee", this amount consisting of "\$200 million in reduction plus the \$85-90 million MTT reductions as offsets to the other rate increases Bell has filed" (pp. 5-6). Commissioner Johnson indicated that "Bell as a counter offered \$120 million plus the offsets", or a total of \$207 million (p. 6). Commissioner Johnson stated that Bell finally agreed to a package \$50 million less than the Commission initially sought (pp. 5-6). This package, of course, contained the \$87 million rate increase in Telpak, program and TWX services (ibid.). It is obvious that such increase was a significant part of the negotiations, and A.T.&T. clearly felt sufficiently confident of its ultimate approval to agree to the total rate adjustment package.

6. None of the user group parties to the instant proceeding was present at the "continuing surveillance" meetings. While such meetings may serve some purpose with respect to voluntary reductions in interstate message toll rates in order to keep total interstate revenues within previously authorized boundaries

(e.g., the previously-approved rate of return range of 7% to 7½%), they can serve no proper function in relation to contested rate increase filings. Had the Commission through the surveillance procedure simply approved a reduction in message toll revenues without regard to offsetting increases in other rates, no basis of complaint as to the absence of a hearing would likely exist at least as far as interstate users were concerned.^{3/} But when the Commission ties \$87 million of reduction for the message toll users - which is a firm reduction not subject to accounting - to \$87 million of contested increases in other rates - supposedly subject to accounting and refund - the Commission has put itself in a compromised and indefensible position. The only way out of this position is to grant the extraordinary relief requested by NAMBO and other user groups in this proceeding.

7. As pointed out in NAMBO's prior petition, this is clearly a situation where a moratorium on interim rate increases is essential to protect the regulatory processes of the Commission and prevent prejudice and serious injury to the consuming public. It must be emphasized that the recent increases constitute the third unresolved level of TELPAK rates on file at the Commission. No determination has yet been made as to the compensatory nature

^{3/} Local telephone users could occupy a different position. The \$237 million in decreases applies only to interstate message toll users. The Bell System has pending in excess of \$500 million in rate increases applicable to local telephone calls according to the recent protest of the surveillance results by the National Association of Regulatory Utility Commissioners. See The Wall Street Journal, November 11, 1969, p. 9.

of the original TELPAK C and D rates (although they have been found required by competitive necessity) or of the over-all lawfulness of the rate increase which became effective September 1, 1968. To pile another large interim rate increase on top of these two yet-to-be resolved rate levels is clearly contrary to proper and fair rate-making procedures. When the prejudgment action of the Commission in the surveillance proceeding in regard to this rate increase is added to the picture, there could hardly be a clearer case for adoption of the "extraordinary relief" which the Commission found unjustified in its November 6, 1969 Memorandum Opinion and Order. The Commission is respectfully urged to reconsider such action, and, in the interests of sound regulatory procedure and fairness and justice to user groups such as NAMBO and the public they serve, rectify its prejudgment of this proceeding by establishing a moratorium on TELPAK rate increases, including the October 1, 1969 filing, until a full and fair hearing has been accorded herein on all the many unresolved issues with respect to the TELPAK offering.

WHEREFORE, NAMBO respectfully requests that the Commission reconsider the aforesaid Memorandum Opinion and Order and, upon reconsideration, grant the relief requested in NAMBO's prior petition herein and postpone the effectiveness of the most recent TELPAK rate

increases until resolution of all the TELPAK issues involved in this proceeding.

Respectfully submitted,

NATIONAL ASSOCIATION OF MOTOR BUS
OWNERS

By /s/ Richard P. Taylor
Richard P. Taylor
1250 Connecticut Avenue, N. W.
Washington, D. C. 20036
Its Attorney

Steptoe & Johnson
1250 Connecticut Avenue, N. W.
Washington, D.C. 20036

Of Counsel

Dated: December 8, 1969

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AMERICAN TELEPHONE & TELEGRAPH COMPANY

REPORT OF REVENUES

NOVEMBER 1969

Re: Dockets No. 15011, No. 16253, No. 18128 ✓
Memorandum Opinion and Order Adopted
July 10, 1969.

Private Line-Teletypewriter (Tariff FCC 260, Series 1000)
Total amount of billing for items increased
effective 11-1-68.

\$4,489,553.93

Private Line-Telpax (Tariff FCC 260, Series 5000)
Total amount of billing for items increased
effective 9-1-68.

\$20,403,471.05

FEDERAL COMMUNICATIONS COMMISSION*
WASHINGTON, D.C. 20554

FCC 69-1357
40437

DEC 10 1969

C
IN REPLY REFER TO:
9100

Honorable Warren G. Magnuson
Chairman, Committee on Commerce
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

At the hearings of your Committee held on December 9, 1969, with respect to S. 1917, the statement was made by one or more witnesses testifying on behalf of the state commissions that this Commission, by its public notice of November 5, 1969, has indicated that it regards a rate of return of 8.5% for interstate telephone operations of the Bell System as acceptable. It was also suggested that the Bell System companies are using this alleged determination by the FCC to support their requests for higher local and intrastate rates in various states.

We believe, in fairness to all concerned, that the record in this regard should be clarified immediately since our public notice of November 5 did not purport to set forth a specific allowable rate of return. Any such specification was deemed by the Commission to be inappropriate to a negotiated rate adjustment in the context of the informal procedures of continuing surveillance.

Our public notice did, however, express our view that in light of current conditions of the capital market, interstate rates which would produce a rate of return which exceeds 7.5% -- the upper limit of the range of return found to be reasonable in 1967 by our decision in Docket No. 16258 -- are not unreasonable. We also recognized in the public notice that there was reason to expect that, absent any further action by the Commission, the reduced rates announced by the public notice, will not, in themselves, prevent the company from achieving earnings in a range of 8.0% to 8.5%.

In making the latter observation, the Commission was not indicating an acceptance or approval of earnings in this range. We were simply expressing our anticipation that the growth patterns inherent in interstate business, combined with the stimulating effects of the contemplated rate reductions on interstate traffic, would continue to increase the going-level of interstate earnings. For these reasons, we stressed our intention to maintain a continuing surveillance of the matter and to take

* Not part of record certified by Commission.

Honorable Warren G. Magnuson

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appropriate action in the light of future conditions. In this connection, as the Commission advised you in its letter of November 17, 1969, and as we testified, we will again be reviewing the level of earnings in the first half of 1970 after, among other things, the effects of any revision in the Federal income tax surcharge are known.


Accordingly, any claim that the Commission specified, as acceptable, a level of earnings in the aforementioned range is a misconstruction of our November 5 public notice and misrepresents our current policies.

Because of the obvious concern of this matter to the state commissions, we are taking the liberty of sending them a copy of this letter together with a copy of our statement before the Committee.

This letter was adopted by the Commission on December 10, 1969.

Commissioner Johnson dissented and will issue a separate letter.

BY DIRECTION OF THE COMMISSION


Dean Burch
Chairman



FEDERAL COMMUNICATIONS COMMISSION*
WASHINGTON, D.C. 20554

52058
C

December 10, 1969

IN REPLY REFER TO:

The Honorable Warren G. Magnuson
Chairman
Committee on Commerce
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

This letter is submitted as a separate statement with the Commission's letter to you of this date regarding the ATT rate of return. As indicated in the Commission letter, I dissented to its adoption.

I simply cannot agree that the Commission's action of November 5, 1969, did not constitute "acceptance or approval" of a rate of return for the Bell System in the range of 8.0 to 8.5%. The majority press release, which was drafted in consultation with Bell, states: "[I]t is anticipated that the rate adjustments announced today will not, in themselves, prevent the Company from achieving earnings in the aforementioned range." That "aforementioned range" was 8.5%. Bell's own press release stated that the rate reduction "will not by itself reduce our interstate rate of return below 8% and we concur in the Commission's view that this reduction should not preclude our achieving interstate earnings next year approaching 8.5%."

Now that the Commission has come down firmly on all sides of this issue, and "approved" virtually all rates of return from 7.0 to 8.5%, the obfuscation is admittedly thick. But I fail to see how any fair reading of these documents can lead to any other conclusion than that the Commission and Bell believe the recent rate reduction will not reduce Bell's interstate rate of return below 8.0 to 8.5%.

That conclusion will, no doubt, be pressed by Bell on state regulatory commissions that will be urged to do no less than the federal regulatory authority. In fact, I expect that other utilities will press the

* Not part of record certified by Commission.

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The Honorable Warren G. Magnuson
December 10, 1969
Page 2

same argument before other regulatory agencies and that the havoc the Commission has wrought will be felt throughout our entire economy.

The Commission accepted a rate of reduction offer from Bell which Bell says will not reduce its rate of return below 8.0%. If the Commission did not "approve or accept" an 8.0 to 8.5% rate of return, it could have moved against Bell rather than accepting its offer. The majority's letter confuses and obfuscates this basic point and that is the reason for my dissent and separate statement to you.

Respectfully,

A handwritten signature in dark ink, appearing to read "Nicholas Johnson", written in a cursive style.

Nicholas Johnson
Commissioner

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Docket No. 18128

(To Be Acted on by the Commission)

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1. Both petitioners request that the Commission reconsider the action taken in its Memorandum Opinion and Order released November 6, 1969 (FCC 69-1196) insofar as it denied their request to hold in abeyance the effective date for TELPAK rate increases filed October 1, 1969 until the issues relating to the TELPAK offering are resolved in Docket No. 18128. The principal ground urged by these petitioners to support their request for reconsideration

is an allegation that the Commission's news release of November 5, 1969 noting that AT&T intended to file offsetting adjustments in the MTT service constituted a change in circumstances now justifying the extraordinary relief heretofore denied by the Commission.

2. To the extent that petitioners urge that the notation by the Commission of AT&T's commitment to file offsetting MTT adjustments constitutes prejudgment of the issues in Docket No. 18128, the Commission is referred to AT&T's Opposition to Petition for Reconsideration dated December 2, 1969 herein which responds to the same argument made by certain airline interests. That Opposition is incorporated herein by reference to avoid repetition. We submit that the invalidity of petitioners' position is clearly established in that Opposition.

3. Coupled with this prejudgment argument, Bethlehem et al. urge that the level of TELPAK rates filed October 1 is manifestly too high because Bell's own studies show the present TELPAK rates to be compensatory. This argument was previously advanced by TELPAK customers, fully responded to by AT&T and thus was squarely before the Commission when it denied the extraordinary relief previously requested by these petitioners.\* Therefore, this argument provides no basis for granting a petition for reconsideration.

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\* See Petition to Reject Further Telpak Rate Increases or for Alternative Relief dated October 10, 1969, filed on behalf of Aerospace Industries Association of America (pp. 24-27); AT&T Opposition dated October 24, 1969 (para. 36).



4. NAMBO argues that the Commission's Memorandum Opinion and Order released November 6, 1969 (FCC 69-1196) did not discuss the basic contentions made in NAMBO's October 17, 1969 Petition nor mention the filing itself. NAMBO then essentially reargues certain of the points in that Petition, including the contention that it is improper for the Commission to permit the October 1, 1969 TELPAK rates to become effective when there are as yet issues concerning the TELPAK offering which are unresolved. These arguments were previously advanced by other TELPAK users in support of their requests for extraordinary relief, were considered by the Commission (FCC 69-1196, paras. 9 and 10) and found to be insufficient to warrant the extraordinary relief sought. Therefore, these arguments provide no grounds for granting NAMBO's petition for reconsideration.

5. Finally, to the extent that Bethlehem et al. argue that the Commission should undertake to accomplish the relief requested in the exercise of its "continuing surveillance" responsibilities over the Bell System, suffice it to say that on the facts, as the Commission has concluded, no such extraordinary relief is justified. To the extent that this invocation of continuing surveillance may be an attempt to suggest another basis for Commission authority to order the extraordinary relief requested by petitioners, we respectfully direct attention to our Opposition herein dated October 24,

1969 (paras. 38-44) which we submit establishes that no such jurisdiction exists.

WHEREFORE, the aforesaid Petitions should be denied.

Respectfully submitted,

BELL SYSTEM RESPONDENTS

By /s/ Harold J. Cohen  
Harold J. Cohen

By /s/ C. Duane Aldrich  
C. Duane Aldrich

By /s/ Alfred A. Green  
Alfred A. Green

195 Broadway  
New York, New York 10007

Their Attorneys

December 16, 1969

67.  
Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C. 20554

|                                     |   |                  |
|-------------------------------------|---|------------------|
| In the Matter of                    | ) |                  |
|                                     | ) |                  |
| AMERICAN TELEPHONE AND              | ) |                  |
| TELEGRAPH COMPANY, LONG             | ) |                  |
| LINES DEPARTMENT                    | ) | DOCKET NO. 18128 |
|                                     | ) |                  |
| Revisions of Tariff F.C.C. No. 260, | ) |                  |
| Private Line Services, Series 5000  | ) |                  |
| (TELPAC)                            | ) |                  |

To: The Commission

FURTHER OPPOSITION TO  
PETITIONS FOR RECONSIDERATION

The Western Union Telegraph Company (Western Union),  
pursuant to Section 1.106 (g) of the Commission's Rules and Regulations,  
opposes the following Petitions for Reconsideration filed in the above  
captioned matter:

- (a) Bethlehem Steel, et al, dated December 5, 1969;
- (b) National Association of Motor Bus Owners (NAMBO),  
dated December 8, 1969;
- (c) Association of American Railroads (AAR), dated  
December 8, 1969; and
- (d) Penn Central Corporation, dated December 8, 1969.

In support hereof, Western Union respectfully states as follows:

I

NAMBO asserts (Pet., pp. 4-5) that the Commission has prejudged the proper level of Telpak rates. NAMBO refers to Message Toll Telephone (MTT) rate reductions of \$150 million and \$87 million and indicates that the \$87 million reduction, in the main, represents an offset to the increase in revenues expected to be generated from the instant Telpak filing. Therefore, concludes NAMBO, the Commission has given "\* \* \* its blessing to the entire package". Similarly, Bethlehem Steel alleges that the Commission had prejudged the proper level of Telpak rates by allowing the instant Telpak filing to go into effect "\* \* \* simply to reduce the rates for MTT" (Pet., p. 6).

II

The above arguments should be rejected. Western Union in its "Opposition to Petition for Reconsideration of 'Airline-Parties'", filed November 26, 1969, answered similar contentions.\* Nothing new has been added, by way of facts or argument, by either Bethlehem Steel or NAMBO. In its above noted "Opposition" Western Union pointed out, among other things, that the proper level of Telpak rates will be the subject of an evidentiary hearing and that Petitioners are adequately protected by an accounting order.

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\* Western Union incorporates herein by reference, its aforementioned "Opposition" filed November 26, 1969.

### III

Additionally, both Bethlehem Steel and NAMBO request rejection, unlimited suspension, withdrawal, etc., of the subject Telpak rate increase. These Petitioners assert that the present level of Telpak rates is "profitable" (Bethlehem, p. 5)\* and indeed, that any rate adjustments in regard to any Bell interstate service should be downward (NAMBO, p. 3). Again, these arguments are not new and have been met before by Western Union. Rather than restate the contents of the prior pleadings, Western Union hereby incorporates herein by reference the following pleadings:

1. Western Union's "Reply to Petitions, for Rejection, Withdrawal or Postponement of the Telpak Rate Revisions Due to Become Effective April 1, 1968", dated February 16, 1968;
2. Western Union's "Reply to Petitions for Suspension, Investigation, and Hearing of Telpak Tariff Increases", dated April 9, 1968;
3. Western Union's "Opposition to Petitions for Resetting, Suspension, Withdrawal or Modification of the Commission's Order (F.C.C. 68-388) Released April 12, 1968", dated May 20, 1968; and

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\* Bethlehem alleges that the present Telpak rates produce a "profit" of \$1,300,000. Bethlehem does not show what investment this "profit" is related to nor what percent return this "profit" produces.

4. Western Union's "Opposition to Petitions for Reconsideration of Memorandum Opinion and Order (F.C.C. 68-711), dated August 16, 1968 (Telpak rate revisions).

In the above enumerated pleadings Western Union showed that there was no legal basis for the Commission to reject or to order AT&T to withdraw the Telpak tariff revision. Petitioners have not introduced any new arguments nor facts to support a different conclusion at this time. Further, the Petitioners are adequately protected by the Commission's imposition of an accounting order.

#### IV

The Association of American Railroads (AAR) and Penn Central request the Commission to clarify or modify its Order of November 6, 1969 (F.C.C. 69-1196). Specifically, these Petitioners request that the accounting order set forth in Paragraph 15 be modified because certain changes in the Telpak tariff may result in users dropping Telpak Service and ordering other services. This is alleged to be "unfair" since Telpak changes (e.g., the equivalency ratio) may, after hearing, be found to be unlawful, thus depriving these Petitioners of refunds. These Petitioners have not stated valid grounds for the relief requested. The speculative nature of these Petitions is cause by itself for rejection of the relief sought therein. Further, these Petitioners, as well as other large Telpak users, have had the benefit of unreasonably low Telpak rates

for close to nine years. They should not be heard to complain now that the instant rate increase may force them to use other communications services, thus depriving them of any possible refunds should they stay with Telpak Service.

WHEREFORE, in view of the foregoing, the aforementioned Petitions for Reconsideration should be denied.

Respectfully submitted,

THE WESTERN UNION TELEGRAPH COMPANY

By /s/ John M. Scorce  
John M. Scorce

Its Attorney

1828 L Street, N. W.  
Washington, D. C. 20036

Of Counsel  
John M. Evans  
60 Hudson Street  
New York, New York 10013

Washington, D. C.  
December 19, 1969



Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,  
LONG LINES DEPARTMENT

Revisions of Tariff F.C.C. No. 260, Private  
Line Services, Series 5000 (Telpak)

Proposed Further TELPAK Rate Increases,  
Tariff F.C.C. No. 260, Series 5000 Service

)  
:  
) Docket No. 18128  
:  
)  
:  
)  
:  
) Transmittal  
: No. 10609

To: The Commission En Banc

MOTION FOR STAY

Come now the Air Transport Association of America (ATA), Aeronautical Radio, Inc. (ARINC), United Air Lines, Inc. (United), Eastern Air Lines, Inc. (Eastern), and Emery Air Freight Corporation (Emery), herein collectively designated "Airline Industry Parties", and pursuant to the provisions of Section 405 of the Communications Act of 1934, as amended, Section 10(d) of the Administrative Procedure Act, as amended, Section 1.106(n) of the Commission's Rules and Regulations, and Rule 18 of the Federal Rules of Appellate Procedure, respectfully move:

- a. That the Commission stay: (1) the effective date of its Memorandum opinion and Order (FCC 69-1196), adopted October 29, 1969, released November 6, 1969, and (b) the effectiveness of further TELPAK rate

increases filed by the American Telephone and Telegraph Company, Long Lines Department (AT&T), under Transmittal No. 10609, presently authorized under said Memorandum Opinion and Order to become effective February 1, 1970, pending the Commission's disposition of a pending petition for reconsideration filed by Airline Industry Parties on November 18, 1969.

b. That in the event the Commission denies the relief sought by said petition for reconsideration, the Commission stay the effective date of its orders, and of the further TELPAK rate increases, until the conclusion of all proceedings on judicial review.

c. That the Commission expedite the consideration and disposition of said petition for reconsideration and of this motion for stay.

In support thereof, the Airline Industry Parties respectfully state as follows:

1. Unless stayed, there will become effective on February 1, 1970, massive increases in TELPAK line haul and terminal charges, and changes in the telegraph/telephone equivalency ratio, which will have an extraordinary adverse effect upon the bulk communications market and create irreparable injury for TELPAK users. For the airline industry alone, the principal non-governmental TELPAK user, there

will have been pyramided in little more than one year two giant increases in TELPAK rate levels aggregating \$28 million, or a 108% increase. AT&T in its filings itself acknowledges that there will necessarily be some cutback in bulk communications services. In fact, those stated cutbacks are only a pale, grossly understated reflection of the disruptions and reductions of service which will be caused by the rate increases in the communications services of TELPAK users.

2. The airline industry, for example, already caught in a severe profit squeeze, must necessarily reevaluate its communications requirements in light of the substantially increased costs. As reflected in the attached affidavit by the Chairman of the Board of ARINC, the communications company of the industry, the increased rates will cause a repression in the demand for service, deletions of existing services, and indefinite deferrals of new service. The change in equivalency, coupled with line haul and terminal increases, will multiply the current cost of telegraph service alone, comprising over 2 million channel miles, by almost four times. Substantial expenditures of time and effort are now being incurred and will extend over a substantial time into the future in order to redesign completely the industry's TELPAK network, beginning with individual

airline point-to-point communications requirements, and to optimize the circuit layout and mix among the various TELPAK and private line offerings of the carrier. There will be a multiplier effect as cutbacks in service reduce fills, shifting demand to smaller bulk offerings or individual private line services.

3. Clearly, an accounting order cannot protect the users against irreparable injury and make them whole again, because the losses in service, efficiencies, and innovations can never be recaptured; no accounting relief can be provided for the disruptions, costs, and losses in the re-designing of substitute systems grossly distorted to adapt them to new rate structures; and injury in the losses in service to the public whom the TELPAK users serve cannot be accurately measured, or adequately recompense the public. As pointed out in the prior petitions to reject filed by TELPAK users, accounting is at best a somewhat illusory, unsatisfactory, and inadequate protection; its defects are magnified many times by the extraordinary size of the rate increases.

4. AT&T has even suggested that there may not be a refund under an accounting if TELPAK rates are ultimately found to be excessive. In its opposition to a motion by the Aerospace Industries Association of America (AIA) to

amend the interest provisions of the Commission suspension and accounting order, AT&T has stated:

"It is possible that the Commission's final determinations herein might include the prescription of new rates, some of which might be lower, and some higher, than those proposed by AT&T, or now in effect. In such circumstances there would be no opportunity for AT&T to collect additional amounts from those customers whose charges were too low during the period of investigation. This inability of the carrier to recoup from those customers whose rates are found to have been too low may properly be considered by the Commission in determining the extent to which the ordering of refunds is proper, and whether interest on such refunds should be imposed."

This statement of position by the carrier participant to the "continuing surveillance" negotiations only serves to confirm the concern by Airline Industry Parties, expressed in their petition for reconsideration, that the reductions in interstate MTT rates to compensate for the increased TELPAK rates have effectively locked the TELPAK users into the new rates and created an apparent prejudgment.

5. Whatever the Commission's views and ultimate disposition of petitioners' arguments against the further TELPAK rate increases, it cannot be gainsaid that substantial issues of far-reaching import defining the duties, responsibilities, and powers of the Commission in its common carrier regulation have been raised by the protesting parties, e.g.:

a. Whether the agency, by closed negotiations between the agency and the carrier, without the presence or participation of affected users, may under a non-adjudicatory "continuing surveillance" procedure agree to the reduction of rates for one class of service, in return for rate increases for another class of service which are already in adjudication with all important issues unresolved, and whether the users are prejudiced thereby;

b. Whether the agency may and should permit the pyramiding of rate increases where unresolved issues on the propriety of two lower levels of rates have never been determined, but have been shifted from proceeding to proceeding with continuing assurances that they will be decided;

c. Whether the further TELPAK rate increases have violated a contractual agreement among the carrier, users, and the Commission which should be enforced by the Commission;

d. Whether adequate reasons and facts have been proffered by the carrier as justification for massive rate increases in compliance with the Commission's own requirements; and

e. Whether the Commission has inherent power and an affirmative responsibility under all of the

circumstances to reject the proposed further rate increases.

6. The relief sought by the petition to reject (earlier denied by the Commission) and by the pending petition for reconsideration is not to extend the period of suspension of the rate increases beyond the statutory period, but to reject or require the withdrawal of the rate increases, and is thus properly a matter of judicial cognizance if the petition for reconsideration of the Airline Industry Parties is denied. Accordingly, petitioners have moved for a stay not only pending the Commission's disposition of their petition for reconsideration, but also during the period of judicial review if their petition for reconsideration is denied. Because the injury to petitioners will clearly be irreparable if the TELPAK further rate increases are not stayed until administrative and judicial review, and because the issues raised are substantial and grave, it is respectfully submitted that a stay should be granted under all of the circumstances.

7. Since the irreparable injury from the further TELPAK rate increases will be greatly magnified unless administrative or judicial relief by stay is granted before the effective date of February 1, 1970, the Airline Industry Parties urge prompt consideration and disposition of their pending petition for reconsideration and of this motion for stay.



AFFIDAVIT OF JOHN S. ANDERSON

John S. Anderson, Chairman of the Board of Aeronautical Radio, Inc., ("ARINC"), being duly sworn on oath, deposes and states the following:

ARINC is the communications company for the air transport industry and a substantial customer for Telpak services leased from American Telephone and Telegraph Company ("AT&T"). ARINC provides the bulk of the point-to-point communications requirements of air carriers by leasing a nationwide Telpak network from AT&T. ARINC is the largest non-government customer of Telpak. The ARINC Telpak network consists of 624 Telpak sections (357 Telpak D and 267 Telpak C sections) and serves more than 100 air carriers. The increases in Telpak rates and the change in telegraph to telephone (or voice) channel equivalency now scheduled to become effective February 1, 1970, would cause substantial irreparable harm to ARINC and to the air transport industry it serves.

The magnitude of the rate increases should be viewed along with the rate increases which became effective on September 1, 1968. ARINC estimates that the annual cost of its Telpak network would be increased by \$28 million over the pre-September 1968 rates--an increase of 108 percent in little more than one year. The following table gives the estimated cost of Telpak services, line haul and terminations, under the three rates, based on the December 1, 1969, Telpak network:

|                                            | <u>Pre-<br/>September<br/>1968</u> | <u>With<br/>9/1/68<br/>Increases</u> | <u>With Proposed<br/>2/1/70<br/>Increases</u> |
|--------------------------------------------|------------------------------------|--------------------------------------|-----------------------------------------------|
| Telpak Charges                             | \$26,000,000                       | \$37,000,000                         | \$54,000,000                                  |
| Amount of Increase Over<br>Previous Rates  |                                    | \$11,000,000                         | \$17,000,000                                  |
| Percent of Increase Over<br>Previous Rates |                                    | 42%                                  | 46%                                           |
| Total Amount of Increase                   |                                    |                                      | \$28,000,000                                  |
| Total Percent of Increase                  |                                    |                                      | 108%                                          |

These new increases, which alone raise costs by 46 percent, will cause substantial irreparable injury to the air transport industry by repressing the demand for service. Each member of the industry must carefully re-evaluate its communications requirements in light of the substantially increased cost of service. Deletions of existing services and indefinite deferral of new services will result. AT&T in its marketing study submitted with Transmittal No. 10609 admits that the airlines will reduce their use of Telpak by about 10 percent, and affiant believes and so states that this figure is understated. If the Commission finds in Docket 18128 that the rate increases were not justified, this under-utilization of communications services can never be compensated by an accounting order. It represents services not performed for the public by ARINC and the air transport industry, efficiencies not realized, and innovations not made.

The equivalency change taken by itself, without any consideration of the line haul and terminal rate increases, will triple the cost of telegraph service used by the members of the air transport industry. This change in equivalency when combined with the other components of the rate increase will result in a cost to the industry for teletypewriter service almost four times the current cost. Since the air transport industry leased over 2,000,000 channel miles of telegraph service under Telpak in September 1969, this drastic increase in its cost will lead to substantial restructuring of virtually every air carrier's communications requirements.

ARINC and the air transport industry will also suffer substantial irreparable injury in the expenditure of time and effort to completely redesign the entire communications system. The changes in the requirements of the industry resulting from the increased cost of service alone would present ARINC with a difficult task in rearranging the coast-to-coast Telpak network, but the effort could be accomplished through modifications to the existing network over a period of

months. The change in equivalency, however, makes that deliberate approach impossible. As a result of this tariff change, many of the Telpak sections now ordered will no longer accommodate the service required. For example, a Telpak D section containing 175 voice channels and 204 teletypewriter channels would have a fill of 80 percent under the base period equivalency of 12:1 and fill of 87 percent under the present equivalency of 6:1. Under the new equivalency of 2:1, this Telpak section would overflow by 17 voice-equivalent circuits. Whether to reroute this overflow through other Telpak sections, to lease individual channels, or to lease an additional Telpak section depends, inter alia, upon the length of the section, the fills of other Telpak sections, and the configuration of the entire network. Multiply this process by more than 600 Telpak sections and it becomes apparent that ARINC, as a practical matter, must completely redesign the network starting with the point-to-point communications requirements of the individual air carriers. This task will consume several thousand man-hours and several hundred hours of computer time between now and February 1.

Even then, the redesign will not be complete. ARINC's goal as of February 1 can only be to have a network design which accommodates the point-to-point requirements of the air transport industry with a reasonable degree of efficiency. Another six to eight months will be consumed in optimizing the circuit layout and mix among the various Telpak categories and individual channel leases. This process of optimization will be complicated by the instability of industry requirements as the individual carriers examine their usage of communications service to mitigate the effects of the rate increases.

The accounting order is inadequate to protect the industry because the network leased from AT&T under the further rate increases would bear no resem-

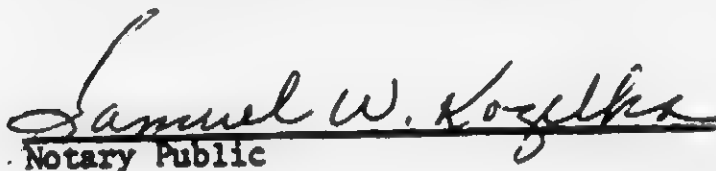
blance either to that which would be leased under the present rates or to that which would have been leased under the base period rates. The order cannot as a practical matter account for discontinued circuits or for overflow into individual channels or additional Telpak leases.

Finally, the disruption to ARINC and the industry is further aggravated by the "multiplier effect." As the individual air carriers reduce their service, the density of communications channels on various routes will decline resulting in an increase in unit costs for the remaining channels. This increase in cost is caused by lower Telpak fills, shifts from Telpak D to Telpak C and from Telpak C to individual channels. As a result of the increased costs of the remaining channels, further reductions may be expected.

Thus, the ultimate result of these tariff changes will be substantial disruption of a vital service rendered by ARINC to the air transport industry and the public. This injury cannot be remedied by an accounting order.

  
J. S. Anderson

Subscribed and sworn before  
me this 12th day of December, 1969.

  
Notary Public

MY COMMISSION EXPIRES JULY 1, 1974

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FCC 69-1407  
40605

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

Revisions to American Telephone and  
Telegraph Tariff F.C.C. No. 263, Long  
Distance Message Telecommunications Service

TRANSMITTAL

NO. 10664

MEMORANDUM OF DECISION

Adopted December 23, 1969; Released December 31, 1969

By the Commission: Commissioners Tamm, Clegg, and Cox concurring and  
issuing statements; Commissioner Johnson dissenting and  
issuing a statement.

1. The Commission has before it for consideration (a) a petition, filed December 10, 1969, by the National Association of Regulatory Utility Commissioners (NARUC), requesting suspension or rejection of the above-captioned tariff revisions now scheduled to become effective January 1, 1970; (b) a petition, filed December 5, 1969, by the City of New York (N.Y.) seeking rehearing with regard to such tariff revisions; (c) a petition, filed December 12, 1969, by The Independent Group (consisting of United States Independent Telephone Association, GTE Service Corporation, United Utilities, Inc., National Telephone Cooperative Association, and Continental Telephone Service Corporation) concurring in NARUC's petition; and (d) numerous letters from individual state regulatory agencies and others also supporting the aforesaid petition of NARUC.

2. The tariff revisions referred to by the aforementioned parties were filed by American Telephone and Telegraph Company (AT&T) under Transmittal No. 10664 on December 2, 1969, to become effective January 1, 1970. They were submitted by AT&T in connection with the Commission's recently completed comprehensive review of the Bell System's interstate operations and earnings requirements and are designed to accomplish reductions amounting to \$150,000,000 in the rates for Long Distance Message Telecommunications Service (long distance telephone). These are the rate reductions referred to in the Commission's Public Notice of November 5, 1969, (FCC 69-1210, 38859).

3. As one of the bases for suspension (and impliedly for formal investigation), NARUC alleges that the revised tariff schedules will create an unlawful discrimination in that they provide for reduced rates applicable to customer dialed calls only. It is alleged that such a reduced rate

\* Not part of record certified by Commission.

discriminates against subscribers who have not been provided with dial service or whose dial service is not equipped for outward customer dialing of toll calls, and against those subscribers with outward customer toll dialing capabilities who seek to place calls to other telephone stations not equipped for inward toll dialing. These allegations of NARUC are not borne out by the specific language of the tariff. The tariff specifically provides that dial station-to-station rates apply where an operator is required to complete a call because of the unavailability of facilities for customer dial completion. Furthermore, this same tariff language has been construed by the telephone company to provide for the application of the currently effective lower customer dial rates between midnight and 7 a.m. to the cases presented by NARUC. Accordingly, NARUC's contention with respect to this point is not well taken.

4. As a second basis for suspension and investigation, NARUC states that the revised rates will aggravate already intolerable disparities between intrastate toll rates and interstate toll rates thereby unreasonably and unjustly discriminating against the intrastate toll users and unreasonably granting a preference and advantage to the interstate toll users. However, the mere allegation that different rates apply for allegedly the same service in different jurisdictions does not constitute a showing of unlawful discrimination, preference, or advantage. Such a difference in rates for what appears to be the same service can properly arise if the unit costs of furnishing the service differ in the interstate and intrastate jurisdictions because of length of haul, traffic density, technological differences or like considerations. Also, differences may arise from differences in the statutory or other bases for rate making in the various state and local jurisdictions as applied to local telephone exchange or intrastate toll service or both.

5. NARUC further alleges that the interstate rate reductions will cause reduced rates and revenues for the 1,650 independent telephone companies without their having had an opportunity to be heard or to participate in the alleged closed rate negotiations between AT&T and the Commission. It is true that at the present time virtually all of the independent telephone companies furnish interstate toll telephone service under joint tariffs filed by AT&T, and that under such a tariff structure, the reductions in rates will apply to the total charges for interstate toll service furnished jointly by the independent companies and the Bell System. However, it does not follow that each independent company will suffer diminished revenues by virtue of such overall reductions in the joint through rates. The traffic composition of a particular company may be such that the reductions in specific rates may not materially affect the revenue from the interstate toll calls in which that company participates. Moreover, a company participating in joint rates which is adversely affected by a reduction in such rates has



alternatives readily available to it to remedy such adverse effect. Thus, it may elect to establish its own rate at a compensatory level and cease to participate in the reduced joint rate or it may seek a revision in its share of the joint rate either by negotiation or by petition to the appropriate regulatory authority. In any case, the instant petition fails to adduce any evidence, or even to allege, that, by virtue of the revised rates, any independent company will receive inadequate compensation for its interstate toll service.

6. NARUC alleges that stimulation in calling which will be caused by the proposed reduced rates will further aggravate what it terms "the existing grave telephone service situation." It also alleges that the changed hours of discount rates will move portions of present traffic into peak hours at distant locations. However, the petition makes no specific showing, other than such conclusory statements, as to the amount of stimulation which may be expected to result or the respects in which the existing or future telephone facilities are or will be inadequate to accommodate any such increased traffic. It is sufficient to note that the Bell System companies, which are aware of their service obligations and existing problems, proposed these rate schedules in the confidence that they can meet service requirements.

7. NARUC states that the interstate rate reduction will cause a further burden on the capital requirements of the associated Bell companies and independent companies which NARUC states "are faced with some of the most difficult financing problems in their history." Again, no specific reasons are advanced as to why either the Bell System or any other company will be unable to obtain necessary capital by virtue of the reduced rates. The Commission has carefully considered both the capital requirements of the Bell System and the rate of return it will need to meet such requirements in the light of the proposed rate reductions. Nothing before us indicates, nor did the Bell System companies contend, that the rate reductions will impair the ability of any telephone company to raise the capital it requires.

8. NARUC finally requests that the proposed rates be rejected or suspended until due consideration can be had by the Commission on a petition for rule-making relative to certain new and complex proposed changes in jurisdictional separation procedures filed concurrently with the instant petition. NARUC's petition for rule-making was placed on public notice on December 12, 1969 (RM-1543). In this connection, we have suggested to NARUC that, to facilitate expedition, the NARUC-FCC staff committee of technical experts be convened as soon as possible in order to consider the proposed changes. We have also urged that such meetings commence as early in January as possible. We have again stated, as we indicated in our Report and Order of January 29, 1969, in Docket No. 17975, that we intend to continue our cooperation with the NARUC and look to these joint studies as the prime forum for providing the expertise and guidance required in this complex area of separations procedures. In the meantime, we see no need to deprive the public



of the benefits of the substantial rate reductions now scheduled to go into effect on January 1, 1970. So far as any change in separations procedures is concerned, if rate adjustments should prove to be necessary as a result of any separations changes which may eventuate, such adjustments may be made at the appropriate time.

9. N.Y., in its petition, does not seek rejection or suspension of the above-captioned reductions in interstate rates. Instead, it requests a rehearing on our November 5, 1969 public notice (FCC 69-1210). N.Y. states that its petition is filed under Section 405 of the Act, 47 U.S.C. 405. Specifically, it seeks to determine the basis for an alleged change in the Commission's findings and conclusions in its decision in Docket No. 16258 and to determine the lawfulness of the interstate rates of the Bell System. Further, it asks us to vacate that portion of our November 5, 1979 public notice that allegedly allows a rate of return over 7½ percent and it asks for an order directing AT&T and New York Telephone Company to keep an account of all charges henceforth paid by interstate users in New York City above charges necessary to earn 7½ percent.

10. The gravamen of the City of New York's complaint is that the Commission has abrogated a prior decision which was rendered after a full hearing, and has done so without participation by all persons showing an interest in the matter. We have previously held that the mere announcement of a decision by a regulated communications common carrier that it will voluntarily file tariff schedules reducing its charges to the public does not constitute agency action within the meaning of Section 405 of the Communications Act. See Public Utilities Commission of the State of California, released February 12, 1965 (FCC 65-93). Our holding in this regard was sustained upon judicial review, The Public Utilities Commission of the State of California v. United States, 356 P. 2d 236 (9th Cir. 1966), 385 U.S. 816 (1966) cert. denied. In that case, we noted that an announcement does not and could not bind anyone to any action. In this respect the petition filed by the City of New York is procedurally defective in that there is no agency action within the meaning of Section 405 of the Communications Act with respect to which a request for "rehearing" will lie. Moreover, N.Y. misconstrues our public notice of November 5, 1969. N.Y. argues that, by agreeing to the \$150 million reduction, the Commission "arbitrarily, capriciously and unlawfully took action affecting a previously set rate of return, and thereby affecting rates, without any opportunity for affected ratepayers to be heard, in a proceeding in which only representatives of AT&T and its own staff were allowed to present evidence. However our public notice did not purport to set forth a specific allowable rate of return. Our public notice expressed our view that in light of current conditions of the capital market, interstate rates which would produce a rate of return which exceeds 7.5% -- the upper limit of the range of return found to be reasonable in 1967 by our decision in Docket No. 16258 -- are not unreasonable. We also recognized in the public notice that there was reason

to expect that, absent any further action by the Commission, the reduced rates announced by the public notice will not, in themselves, prevent the company from achieving earnings in a range of 6.0% to 8.5%. In making the latter observation, the Commission was not indicating an acceptance or approval of earnings in this range. We were expressing our anticipation that the growth patterns inherent in interstate business, combined with the stimulating effects of the contemplated rate reductions on interstate traffic, would continue to increase the going-level of interstate earnings. We will again be reviewing the level of earnings in the first half of 1970 after, among other things, the effects of any revision in the Federal income tax surcharge are known. Accordingly, any claim that the Commission specified, as acceptable, a level of earnings in the aforementioned range is a misconstruction of our November 5 public notice and misrepresents our current policies.

11. Disregarding its misconstruction of the effect of the Commission's public notice and treating the pleading as a petition for investigation, it is still defective. Its sole basis for alleging the unlawfulness of the proposed tariff schedules appears to be that the Commission has indicated such schedules may produce a return somewhat in excess of that found to be reasonable in 1967. This fact, if proven, is not sufficient to establish the unlawfulness of the proposed rates. It is well settled that the question of what is a fair rate of return is dependent on the facts and circumstances prevailing at the time of its determination. New York has failed to allege any facts relating to present economic conditions which would tend to indicate that the going level of earnings to be produced by the proposed rates is presently unreasonable.

12. With respect to New York's request for an accounting order, it should be noted that, even were its allegations sufficient to raise a question as to the unlawfulness of the proposed rates, New York cites no provision of the Communications Act which confers authority for the Commission to enter an accounting order with respect to reduced rates. Section 204 authorizes us to issue accounting orders when increases, but not reductions, in rates are filed, 47 U.S.C. 204.

13. In view of all of the foregoing, we conclude that the aforementioned requests should be denied.

14. ACCORDINGLY, IT IS ORDERED, That the petitions of the National Association of Regulatory Utility Commissioners (NARUC), the City of New York, and The Independent Group, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION \*

\*See attached statements

Ben F. Neple  
Secretary

## CONCURRING OPINION OF CHAIRMAN DEAN BURCH

There is an old saw among lawyers that "if you're weak on facts, argue the law; if you're weak on law, argue the facts; if you're weak on both the law and the facts, pound the table." This statement is in response to Commissioner Johnson's table pounding dissent.

To place it in proper perspective the dissent violently castigates the Commission for negotiating promptly the largest interstate rate reduction in history. A rate reduction 25% greater than the Commission was able to prescribe, with Commissioner Johnson's concurrence, in a Decision and Order issued almost two years after the institution of formal hearing procedures in 1965.

The Commission need not apologize for its negotiations or for the results achieved. Perhaps the reductions are less than we would have ordered after another hearing, and perhaps not. The fact is, interstate users will enjoy immediate and substantial benefits, and without having to await the uncertain outcome of another hearing.

So much for what the Commission did. Even more important is what we did not do.

First, we did not, and in fact could not, as a matter of law, in these continuing surveillance proceedings change the rate of return findings and conclusions made after our hearing in Docket No. 16258. Any allegation that the Commission has approved or authorized a return of 8.0 to 8.5% is erroneous and should be rejected. We did express the view that, under current conditions, earnings in excess of 7.5%, after the substantial reduction of rates to be effective January 1, 1970, would not necessarily be unreasonable. (See concurring statement of Commissioner Cox.)

Second, as Commissioner Johnson should well know, our forecast that under the proposed rate schedule with current traffic trends and the stimulation resulting from the rate reductions, the company might well reach the 8.0 - 8.5% range of return before the end of 1970, does not mean that the Commission will not take further action if such earnings are achieved. The Commission made clear in its public announcement of November 5, 1969 that in the first half of 1970 or well within the next six months we will again review AT&T's level of earnings with a view to procuring any future adjustments that may be justified.

Third, I confess I do not understand the "Comments" of Commissioner Johnson with respect to "separations." So far as I can determine, separations has been the subject of continuing and detailed study. There has been no "refusal to consider all alternatives in the pricing of telephone service." To the contrary, anyone aware of what we have been doing would know there have been frequent and significant changes in separations procedures. In fact, since the early 1950's some \$800 million of revenue requirements have been transferred from the intra to the interstate jurisdictions. These transfers have for the most part been reflected in lower charges to "American consumers of local exchange and intrastate toll service." This is emphatically not a record to be ashamed of, nor a sign of obliviousness to the interests of the local exchange user.

Fourth, the dissent makes the statement that "So little information has been filed by Bell that it is impossible to tell whether the rate changes will result in any reductions at all," and that "No information has been furnished to indicate how Bell arrived at these reductions, or what alternatives were presented and rejected by the company." It is obvious from an examination

of the tariff schedules that reductions in charges to the public will result. When the station day rate for customer dialed calls across the country during the business day are reduced from \$1.70 to \$1.40, or from \$1.25 to \$.90 in the evening, any one can determine whether there has in fact been a reduction in rates. The Commission has volumes of data from Bell and in my short time here I have been impressed by the ability of our staff to evaluate it. Numerous conferences were held between representatives of Bell and the Commission's staff at which alternative rate schedules were discussed. Moreover, the Commission's New York Common Carrier Field Office has investigated basic company data in this respect. Although calculations such as those involved here of necessity are not precise, and obviously cannot be verified to the last decimal point, this does not mean that the Commission has not checked the data sufficiently to be satisfied that the estimates are reasonably accurate.

Fifth, we did not ignore the effect of the possible reduction in the Federal corporate surtax if the pending income tax legislation becomes law. We specifically referred to it as one of the matters which we would take into account, when the uncertainty was removed, in the course of our 1970 review.

Sixth, Commissioner Johnson takes us to task for permitting rate increases to go into effect in November 1969 for television program transmission and teletypewriter exchange (TWX) services with offsetting decreases not to be effective until February 1970. The TWX increases did not go into effect in November as Commissioner Johnson states but were in fact suspended along with radio transmission and Telpak rate increases until February. At

that time even though the rate increases are subject to hearing and could be disallowed with refunds ordered, the Bell System agreed to put offsetting toll rate decreases in effect. In view of this and the minuscule effect upon the rate of return of the television program rate increases for the three-month period, it did not seem inappropriate to allow all offsets to be made effective at the same time - February 1, 1970.

Seventh, we are fully aware of the methods by which the Bell System companies computed the reductions and the traffic volumes used. This matter was discussed with the company and was resolved to the Commission's satisfaction on the basis of current traffic levels.

Finally, before closing I must express a personal distaste for broadside attacks upon the intelligence and integrity of my fellow Commissioners and our undermanned staff. We do not "sit by, snugly, ratifying rate reductions Bell does not oppose" and Commissioner Johnson knows it. In this connection see his concurring statement in Docket No. 16258 where he said "Bell has been virtually forced by this Commission into every recent interstate rate reduction it has made . . ." (9 FCC 2nd 30, 125, 1967). Rate reductions of almost \$300,000,000 during a two-year period of rampant inflation rebut conclusively Commissioner Johnson's allegation that telephone regulation by this Commission "is more designed to serve corporate interest than consumer interest." Let me make this clear. The Commission and its staff are not above criticism. Any criticism or even attack with supporting evidence would be welcome even if embarrassing. But broad generalities devoid of any reference to fact are a different matter and should result in another type of embarrassment -- but not to the Commission.



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CONCURRING STATEMENT OF COMMISSIONER KENNETH A. COX

I concur in this decision, but wish to add the following comments. The Commission has not fixed a rate of return as a result of its recent negotiations with A. T. & T. It has recognized that, in the face of undisputed changes in conditions since 1967, a level of earnings somewhat above the maximum then formally prescribed is not now unreasonable, but has indicated that it will be prepared to give further consideration to the matter if and when the company's rate of return reaches still higher levels.

Meanwhile, we have obtained present reductions in rates to the maximum degree possible through our continuing surveillance procedures. If New York City or any other representative of users of interstate toll telephone service had made an adequate showing, I would have been prepared to order an investigation of the level of earnings to be expected as a result of these rate adjustments. But the City alleges only that an investigation is required because we have indicated that earnings of more than 7.5% are not unreasonable, without itself showing that such earnings would, on the contrary, be unreasonably high. Something more than a mere conclusory allegation is required.



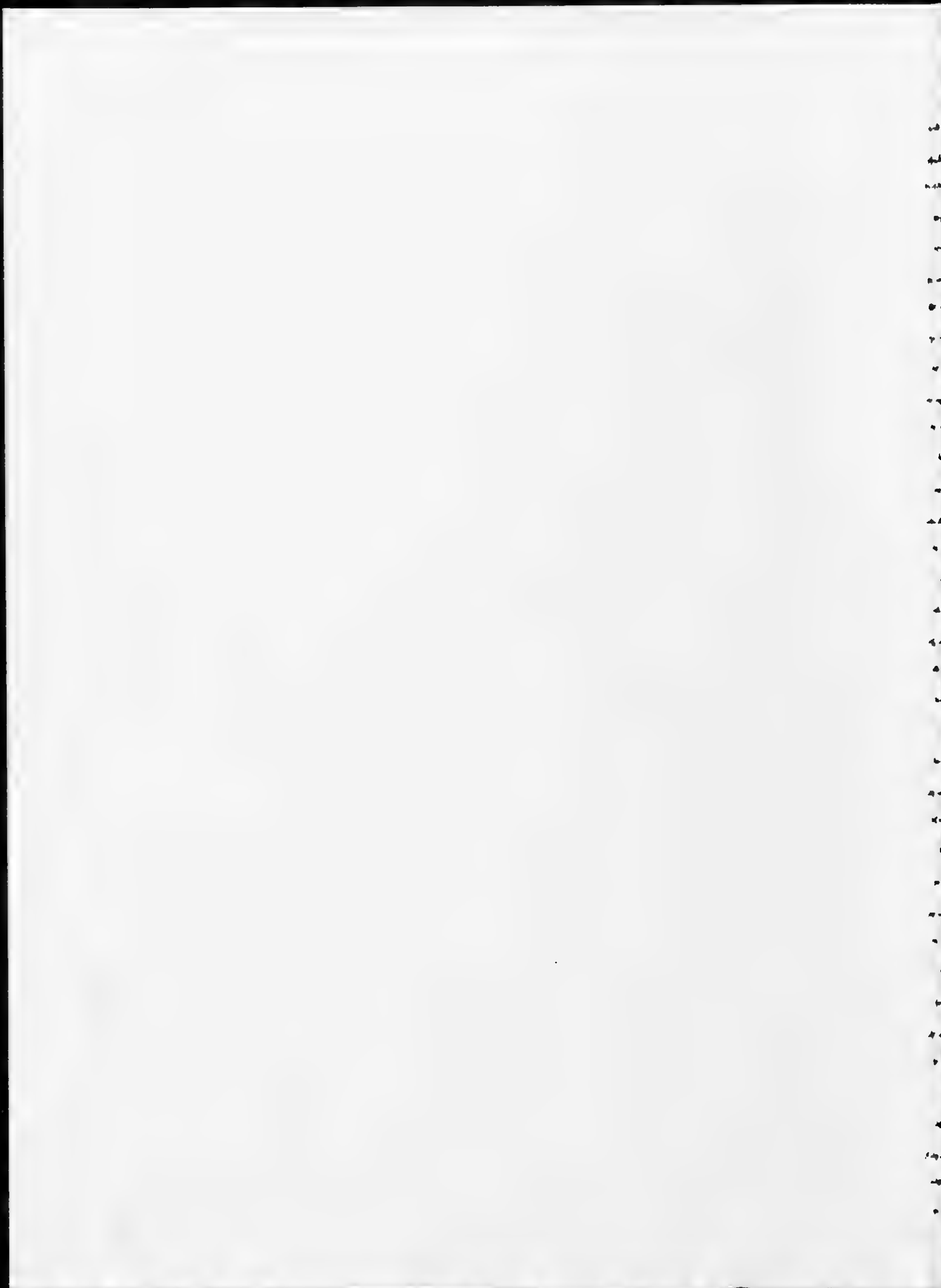
Continuous Surveillance--II

## Dissenting Opinion of Commissioner Nicholas Johnson

I dissent to the Commission's rejection of petitions to suspend the rate reductions filed by ATT as a result of the Commission's "continuous surveillance" decision. I would suspend these rate reductions for one day, institute formal proceedings on rate of return and separations, and make the City of New York, the National Association of Regulatory Commissioners (NARUC), and the Common Carrier Bureau parties to the proceeding.

I have already outlined my disagreement with the majority in the conduct of this matter. A. T. & T., \_\_\_ F. C. C. 2d \_\_\_ (1969). FCC 69-1210, Nov. 5, 1969; See also Letter from Commissioner Nicholas Johnson to Senator Warren G. Magnuson, Dec. 10, 1969. Briefly, I believe the Commission accepted too little in the way of reductions by Bell, and unlawfully modified its 1967 decision on rate of return.

Without any formal hearings in which aggrieved parties might be heard, the Commission has decided that Bell is entitled to earn more than the ceiling of 7.5% set in 1967 after a formal rate investigation. In fact, the Commission now acquiesces in a rate structure which both the Commission and Bell acknowledge will allow Bell to earn in the range of 8.0 to 8.5%. Despite protestations to the contrary, 8.0 to 8.5% is the rate of return now permitted by this Commission.



It may be, as the majority says that this is not our "policy."

But it is the range which our actions will produce.

The NARUC petition raises serious questions which the Commission should resolve. "Separations" policy calls for a quantity and quality of research and systematic economic analysis which this Commission has so far been unwilling to undertake. I do not believe we serve the interests of the American consumers of local exchange and intrastate toll service by our refusal to consider all the alternatives in the pricing of telephone service. It is easy to sit by, smugly ratifying rate reductions Bell does not oppose. But our actions often make it all the more difficult for the states to resist rate increases sought by the same company. These are rate increases brought about by Bell's ability to reduce costs for interstate service under present separations procedures, but apparent inability to make the same reductions for local service. In fact, the company is even unable to maintain the quality of local service.

In dealing with the petition of the City of New York the majority disingenuously relies on the California PUC case [The Public Utilities Commission of the State of California v. United States, 356 F. 2d 236 (9th Cir. 1966), cert. denied, 385 U. S. 816 (1966), affirming FCC 65-93 (1965)], despite the fact that the case before us raises an entirely different legal situation. Not only has the FCC here made its

decision on continuous surveillance after a formal rate proceeding in which a rate of return was specified, but the Commission in this continuous surveillance proceeding recognized the need for some sort of consumer representation by appointing special staff counsel. Finally, the City of New York petition is in effect a petition to suspend the new tariffs that have been filed by Bell, thus clearly avoiding the procedural defects found by the Court in the California PUC case.

It is also instructive to examine the rate reductions that Bell has filed. So little information has been filed by Bell that it is impossible to tell whether the rate changes will result in any reductions at all. No information has been furnished to indicate how Bell arrived at these reductions, or what alternatives were presented and rejected by the company. Bell estimates that the reductions will result in a \$151 million reduction in gross revenues. This figure was achieved by repricing the estimated calls for 1970 under the new tariffs (a \$166 million revenue reduction), subtracting \$45 million for the new revenue stimulated by the lower prices, and adding \$30 million to the reduction for the shifts in calling patterns stimulated by the reductions.

By allowing Bell to do its repricing based on anticipated 1970 calling rates, rather than the 1969 test year data upon which the company urged the Commission to rely in all its other calculations about future financial results, the Commission allows the company to overestimate

the revenue reduction effect of the rate changes. Apparently some effort is being made to induce Bell to modify its position, but the result is that the Commission here accepts tariffs which clearly do not result in a \$150 million reduction. Bell thus uses "future projections" when they serve its corporate interests, and simply refuses to supply the data when its interests may be harmed by making full disclosure.

The Commission has very little data, and almost no capacity to evaluate what it does have. It has given little consideration to the peaking characteristics of message toll telephone service (MTT), or the effect of the reductions on telephone system utilization.

Finally, the Commission ignores the fact that Bell has already received, and will soon receive more, additional income not considered in the continuous surveillance negotiations.

In November 1969 the Commission allowed \$20 million in rate increases to go into effect for the television program transmission service and the teletypewriter (TWX) service. These increases were to be offset by reductions in the MTT service. But the offsetting reductions are now to not be made until February 1970.

The Commission has refused to direct Bell to take account of changes in the surtax. Bell's new rates are due in early January 1970. So is a surtax reduction. If the surtax goes from 10% to 5%, as is now

proposed, Bell will receive about \$70 million in additional revenue from this single change alone! There is no disagreement about this figure. It is typical of the kind of "known changes" the Commission normally considers in ratemaking for the future as compared with a base year. Since its inception the Commission has calculated Bell's rate of return on the assumption that the consumer should pay the full surtax--and much of Bell's case for rate increases in the states depends on the effects of the surtax. Even if justification could have been found for this earlier policy, clearly now these tax charges should be returned to the consumer. Instead, the majority promises a review "sometime" in 1970 to consider Bell's level of earning--during which Bell will be allowed to pocket the entire benefits of the surtax change.

Bell has recently chosen this, of all times, to raise its dividend payout. It takes this brazen and untimely action despite its argument during the surveillance proceedings, and the testimony of its experts, that Bell's stock should be treated the same as industrial growth stocks. Growth companies typically use retained earnings to finance growth--not to increase dividends. Bell's action in raising its dividend is not only cynically inconsistent with its formal presentation to the FCC, it also will result in increased external financing requirements to the detriment of the consumer (and possibly shareholders as well).

We are used to telephone regulation that is more designed to serve corporate interest than consumer interest. That's not new. But a new and basic question in this proceeding is whether the Commission can insulate the company and the Commission from review by parties who feel themselves aggrieved. Perhaps it can. But if so it is a sad commentary on the present state of control of monopoly enterprise generally, and of the telephone company in particular.



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Docket No. 18128

Revisions of Tariff F.C.C. No. 260
Private Line Services, Series 5000
(Telpak)

OPPOSITION

The Bell System Respondents (Bell), pursuant to § 1.106(g) of the Commission's Rules, hereby oppose the petitions for reconsideration of Penn Central Transportation Company (Penn Central) and the Association of American Railroads (AAR), dated December 5, 1969 and December 8, 1969, respectively. In support of its opposition Bell respectfully states the following:

1. Petitioners ask reconsideration of the accounting order set forth in Paragraph 15 of the Commission's Memorandum Opinion and Order of October 29, 1969 herein (FCC. 69-1196, released November 6, 1969). Their principal assertion is that, as a result of the reduced equivalency of telegraph grade to telephone grade channels contained in the TELPAK tariff revision filed on October 1 with AT&T Transmittal No. 10609, customers may be required to order individual

private line services to meet requirements which could have been priced in TELPAK sections under a higher equivalency ratio. Petitioners urge that the Commission recast its order to require AT&T to account for the amounts received for these other services. Petitioners also request similar modification of the Commission's accounting order of July 10, 1968 (13 F.C.C.2d 853) which dealt with the TELPAK rate revisions that became effective on September 1, 1968.*

2. These petitions contain no new considerations which have not previously been brought to the Commission's attention. Appendix A to Penn Central's present petition consists of a copy of its previous petition, dated July 9, 1968, in which it urged the Commission to impose similar accounting requirements in connection with the current TELPAK rates which became effective on September 1, 1968. This earlier petition may have been filed too late to receive express consideration in the Commission's above order of July 10, 1968. However, Penn Central again expressly requested similar relief in its "Petition for Suspension and Investigation, and for Imposition of an Accounting Order" dated October 15, 1968,** which was before

* Insofar as the present petitions are directed to the Commission's Opinion and Order of July 10, 1968, they are untimely, coming well over a year after the time permitted by § 1.106(f) of the Commission's Rules.

** Paragraph 9 of that petition noted the possibility of reconfigurations to accommodate the reduced equivalency ratio and paragraph 10 stated that the "accounting order must . . . recognize . . . the effect of the changed equivalency ratio, and the probability of spill-overs into interexchange channels."

the Commission when it adopted its Order of October 29, 1969.

3. Turning to the merits, we believe the Commission's orders correctly limited the accounting to amounts received under the revised TELPAK rate schedules. The accounting and refund provisions of § 204 of the Communications Act apply only where there is a "proposed increased charge" whose operation has been suspended, and the refund is limited by the Act to "such increased charges." Thus, the only charges subject to refund under the Act are those previously suspended - which, in this case, are the TELPAK charges. Hence, there is no statutory basis for requiring an accounting of amounts received under other tariffs whose charges have not been increased or suspended.

4. On practical grounds as well, these petitions should be denied. TELPAK sections typically form parts of complex and dynamically changing communication systems. The TELPAK tariff revisions filed by AT&T on October 1, 1969 (as well as those which became effective September 1, 1968) are not limited to a change in the equivalency regulation, but also increase the rates for TELPAK C and D base capacities, for service terminals and for connecting arrangements. These rate increases will undoubtedly impel some customers to revise their requirements and undertake extensive reconfigurations of their systems. As suggested by Penn Central (para. 7).

these changes may include the selection of alternative service offerings and a reduction in the quantity of service furnished by Bell. They may also include the selection of different geographic routings or pricing configurations, the utilization of non-Bell furnished equipment and services and a general restructuring of the customer's communication requirement. There is no practicable means of ascertaining which request for a different or additional service may be attributable to the change in the equivalency regulation. Moreover, even if a private line circuit could be properly identified as "spill-over" initially, its continuing status as such would always be subject to doubt with changes in TELPAK pricing configurations and other service requirements.

5. In other cases, a customer utilizing TELPAK, Private Line, and Message Toll Telephone services may simply decide to devote a larger proportion of a given TELPAK base capacity to teletypewriter service, relinquishing some portion of its TELPAK base capacity previously arranged for voice service. In such a case, the "spill-over," if any, would probably be reflected in increased MTT billings. There is no way of identifying and quantifying that increase. To take another example, assume a service requirement involving three points - X, Y, and Z. X and Y form the base, and Z the vertex of a triangle. A customer who presently utilizes TELPAK C sections between X and Z and between Z and Y might,

as a result of the TELPAK tariff changes, convert to a TELPAK D section between X and Y, with side-legs, comprised of Series 1000, 2000, or 8000 channels, between X and Z. There would be no demonstrably correct way of associating a portion of the revenues from the non-TELPAK services that make up the side-legs with the change in the equivalency regulation.

6. The difficulties of identifying and accounting for, customer by customer, other services that may be ordered as a result of the reduction in the equivalency regulation are matched by the problems that would be involved in attempting to postulate retrospectively what would have been the TELPAK usage of individual customers under a higher equivalency ratio. The ultimate responsibility for the selection of the type of service to be utilized and the point-to-point configuration of a customer's communication system rests with the customer. In the case of a complex system, given the dynamic and changing nature of many customers' requirements, the variety of possible routings, the economic trade-offs implicit in the different rates for TELPAK C, TELPAK D, and channels ordered under other tariffs, and the differences in regulations which may influence the choice among services, two customers might, under similar circumstances, choose systems with widely different configurations and point-to-point operating characteristics. As Penn Central stated in its

earlier petition,* "It is self-evident that there are a multitude of possible configurations and that the costs thereof can vary widely." It would be impracticable, if not impossible, for the carriers to keep accounting records that would enable them to determine retrospectively, month by month, the network layouts that might have been ordered under some equivalency ratio different from that in effect when the services were actually ordered.

7. Penn Central (para. 10) and AAR (para. 5) now suggest that they can keep records sufficient to indicate the number of channels that would have been included in TELPAK sections under equivalency ratios of six-to-one and twelve-to-one, and Penn Central further alleges that such data will make it possible to calculate the TELPAK sections that would have been required under any other equivalency ratio. For the reasons already indicated we are unable to perceive the adequacy or validity of such data for the purposes proposed. Moreover, Petitioners apparently have proceeded on the erroneous assumption that the equivalency regulation alone will determine the quantum of TELPAK service that is ordered. But whether changes in the equivalency regulations will raise or lower overall TELPAK charges depends upon the level of other TELPAK rate elements, the rates for

* Petition for Suspension and Investigation, and for Imposition of an Accounting Order, dated October 15, 1969, para. 9.

other services and the demand characteristics of the market. In this docket the issues relating to the appropriate equivalency are essentially questions of rate structure, not rate level. The lower equivalency ratio proposed is a reflection of the relatively higher costs of providing telegraph as opposed to telephone channel terminals. Consequently, even if the Commission should ultimately find a higher equivalency ratio appropriate, any resulting advantage on that account to users of telegraph grade channels would likely be offset by higher charges for other rate elements.* Hence a mechanical, after-the-fact application of a different equivalency ratio could not provide the basis for a sound determination of the amount of TELPAK service that would in fact have been ordered by the users of our other services.

8. Thus, both legal and practical considerations dictate that any refund of TELPAK overcharges pursuant to § 204 of the Act be determined by a comparison of the TELPAK service actually provided at the rates in effect and the charges for such service at the rates ultimately found

* Counsel for Penn Central has informed us that the assertion in paragraph 5 of its petition that "the increased charges to be imposed on this petitioner alone will likely amount to millions of dollars before the issues in this proceeding are finally determined" was intended to refer to its total estimated charges commencing with the TELPAK rate increases that became effective on September 1, 1968. It would seem that only minor fractions of any such amount could be associated with changes in the equivalency regulation.

justified, and that the accounting performed under § 204 correspondingly be limited to amounts received under the suspended TELPAK tariffs.

WHEREFORE, the aforesaid petitions for reconsideration should be denied.

Respectfully submitted,
BELL SYSTEM RESPONDENTS

By /s/ Harold J. Cohen
Harold J. Cohen

By /s/ C. Duane Aldrich
C. Duane Aldrich

By /s/ Herbert R. Sokolsky
Herbert R. Sokolsky

195 Broadway
New York, New York 10007
Their Attorneys

December 23, 1969

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of

American Telephone and Telegraph Company
Long Lines Department

Revisions of Tariff F.C.C. No. 260
Private Line Services, Series 5000
(Telpak)

Docket No. 18128

OPPOSITION

(To Be Acted Upon by the Commission)

The Bell System Respondents (Bell), pursuant to § 1.106(g) of the Commission's Rules, hereby oppose the Petitions for Reconsideration dated December 8, 1969 filed on behalf of Microwave Communications, Inc. (MCI) and MCI-New York West, Inc. (NYW).^{*} In support of this opposition it is respectfully stated as follows:

1. Petitioners request that the Commission reconsider the action taken in its Memorandum Opinion and Order released November 6, 1969 (FCC 69-1196) insofar as it denied rejection or suspension of the Series 11000 tariff offering and permitted the tariff revisions embodying this service to go into effect. In addition, MCI requests that the investigation of these tariff revisions be expedited and considered

* NYW's Petition is defective because of a failure to comply with that portion of § 1.106(b) pertaining to the showing required in a petition for reconsideration by a person not a party to the proceeding.

separately from the broader issues in Docket No. 18128 which relate to the lawfulness of the nonprogram service portions of Tariff F.C.C. No. 260.

2. At the outset it is clear that, apart from the merits of the claims made by Petitioners, the relief requested, i.e., rejection or suspension will not lie. The tariff revisions at issue went into effect on November 1, 1969. Under the statutory scheme of the Communications Act these rates can be modified by the Commission only after hearing pursuant to § 205 of the Communications Act.

3. In any event, the arguments advanced by MCI are without merit. MCI has, in substance, done nothing other than to simply restate the same arguments which were considered and rejected by the Commission in its November 6 Memorandum Opinion and Order (FCC 69-1196, paras. 2-8) denying the relief here requested. The material contained in MCI's Petition beginning in paragraph 19 and the matter displayed in the table on page 16A contain erroneous statements of fact and misleading arguments based on specious

* Thus it is unclear what MCI is requesting the Commission to stay in its Petition for Stay dated December 8, 1969, since the rates in question are already in effect. Insofar as the portion of that Petition dealing with separate hearing treatment of the Series 11000 rates is concerned, it does not appear that any stay, as such, of the Commission's November 6 Order is necessary. In these circumstances we do not believe a separate response to the Petition for Stay is required.

data comparisons. The propriety of MCI's assertion of these factual allegations for the first time in its petition for reconsideration is dubious in view of the failure to show compliance with the requirements of § 1.106(c) of the Commission's Rules. In any event, this material relates to arguments previously made by MCI concerning the alleged discriminatory nature of the AT&T rate structure. Such arguments can be appropriately dealt with in the Commission's investigation in Docket No. 18128. Therefore, the requests for this relief should be denied.

4. NYW's Ashbacker argument is entirely inapposite.* It is clear that neither the offering of Series 11000 by AT&T nor the action by the Commission permitting Series 11000 rates to go into effect gives rise to rights cognizable under the Ashbacker doctrine. The Commission has made it clear that questions regarding the extent to which additional § 214 authority or radio licenses may be required for Series 11000 service should be determined only after the development of facts on the hearing record in this proceeding (FCC 69-1196, para. 4).

5. MCI requests that the investigation pertaining to Series 11000 be separated from the broader issues involved in Docket No. 18128 and decided on an expedited basis. Apart from an allegation that a determination of the issues relating

* See Ashbacker Radio Corp. v. Federal Communications Comm'n, 326 U.S. 327 (1945).

to Series 11000 would be unduly delayed in Docket No. 18128, MCI advances only contradictory reasons in support of this request. Thus, on the one hand, it asserts that the issues to be tried in Docket No. 18128 "are, for the most part, general in nature, applying equally to all of the AT&T private line tariff schedules," and that the issues and implications arising out of the Series 11000 offering are "unique" (paras. 6, 31). On the other hand, MCI also asserts that the Series 11000 issues are "fundamental and far reaching" (para. 31) and "unique to the continuing private line morass" (para. 8). In fact, the severance requested by MCI would be appropriate only if the Commission believes that the lawfulness of the Series 11000 revisions can be determined apart from a concurrent consideration of the other elements of Bell private line services, a conclusion which appears to be belied by the Commission's prior pronouncements in this proceeding suggesting a close interrelationship among all such services, including Series 11000.

WHEREFORE, the aforesaid Petitions for Reconsideration should be denied.

Respectfully submitted,
BELL SYSTEM RESPONDENTS

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By /s/ C. Duane Aldrich
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Their Attorneys

December 23, 1969

Docket No. 18128

OPPOSITION TO MOTION FOR STAY
(To Be Acted Upon by the Commission)

The Bell System Respondents (Bell), pursuant to § 1.45 of the Commission's Rules, hereby oppose the Motion for Stay dated December 19, 1969 filed by Air Transport Association of America, Aeronautical Radio, Inc., United Air Lines, Inc., Eastern Air Lines, Inc., and Emery Air Freight Corporation (herein collectively designated Airlines), and in support of such opposition respectfully state as follows:

1. The Airlines request that the Commission stay the effective date of its Memorandum Opinion and Order released November 6, 1969 (FCC 69-1196), and "the effectiveness of further TELPAK rate increases . . . presently authorized under said Memorandum Opinion and Order to become effective February 1, 1970." Such stay is requested pending Commission disposition of the Airlines' petition for reconsideration filed

November 18, 1969, and, in the event the Commission denies the relief sought in the petition for reconsideration, pending conclusion of all proceedings on judicial review.

2. The Motion for Stay should be denied. Manifestly the purpose of the motion is to secure a deferment of the effective date of the TELPAK rate revisions now scheduled to become effective February 1, 1970. But a stay of the Commission's Memorandum Opinion and Order of November 6 would accomplish nothing in that regard since the effectiveness of the TELPAK rate revisions does not depend on operation of the Commission's order. By its November 6 decision the Commission instituted an investigation of the revised TELPAK rates, suspended such rates for the full three-month period authorized by § 204 of the Communications Act, and in conjunction therewith ordered that the carriers keep account of the amounts received under the revised rates, such amounts to be subject to possible refund after hearing and decision. Under the provisions of § 204, the suspended rates "shall go into effect" at the end of the suspension period, unless during that period the required full hearing has been completed and a Commission order issued. Hence a stay of the Commission's order could not delay the effectiveness of the revised TELPAK rates beyond February 1, since their effectiveness on that date does not depend on the authority of the Commission's order, but rests squarely on the carriers' right to file rates under the Act.

-3-

3. The Airlines have coupled their request for a stay of the Commission's November 6 order with a request for a stay of "the effectiveness of further TELPAK rate increases." In substance this is simply a repetition of the requests for extraordinary relief previously made herein on four occasions by these parties.* As such this aspect of the motion is subject to summary rejection on the ground that it is repetitious and filed without compliance with § 1.106(f) of the Commission's Rules. In any event, in their responses to the Airlines' pleadings noted above Bell has demonstrated the lack of any basis or justification for such extraordinary relief. See the Oppositions dated October 24 and December 2, 1969, both of which are incorporated herein by reference.

4. In an attempt to buttress their request for a stay of the TELPAK rate revisions during the pendency of administrative and judicial review, the Airlines argue that imposition of such rates will cause them irreparable injury. In support of this argument they have attached an affidavit, purporting to detail the impact of these rates on the airline

* Petition to Reject, or Require or Secure Withdrawal of, Further Telpak Rate Increases, and Request for Oral Argument, dated October 10, 1969; Petition for Suspension and an Accounting, and for Other Relief, dated October 17, 1969; Petition for Reconsideration Predicated Principally Upon New Facts Reflecting Basic Misconceptions and Resulting in Apparent Prejudgment, dated November 18, 1969; and ARINC Petition for Suspension and Accounting, for Withdrawal or Postponement, and for Other Relief, dated October 17, 1969.

industry, which concludes that the "ultimate result of these tariff changes will be substantial disruption of a vital service rendered by ARINC to the air transport industry and the public." That the impact of the revised rates on the airlines' communications expenses will be substantial is clear, but the affidavit provides no substantiation for the assertion that the result will be a disruption of vital services to the airlines, or that the refund and reparation provisions of the Communications Act are inadequate to protect the airlines in the event of ultimate Commission findings that TELPAK rate levels are too high.

5. The methods employed in preparing the table of estimated TELPAK charges shown on page 1 of the affidavit are not revealed in the affidavit, but experience has shown that ARINC's estimates of the impact of TELPAK rate changes tend to be inflated. During cross-examination of the affiant John S. Andersen (in the hearings in Docket No. 16258) he acknowledged that the actual effect on the airlines of the September 1, 1968 TELPAK rate changes had been substantially less than estimated by ARINC. (36% increase versus 52% estimated. Docket No. 16258, Tr. 19822-24. And see Tr. 19831-34 for another example of unrealistic assumptions used by ARINC in estimating future TELPAK charges.) Moreover, there is no showing in the affidavit of the relative significance of communications charges

in the airlines' total operating budgets, nor is there even any allegation that the airlines are, or will be, financially unable to pay the TELPAK charges in question, or that they will be unable to order any communications services required for their operations. In these circumstances the claim that the TELPAK rate revisions will cause irreparable injury to the Airlines is without substance.

6. Essentially the same claims of adverse impact on the airlines were argued by ARINC and were before the Commission when it issued its Memorandum Opinion and Order of November 6. (See ARINC Petition for Suspension and Accounting, dated October 17, 1969, pp. 3-5 and Attachments.) The Commission indicated its awareness of these arguments in its decision, and concluded that, apart from any question as to its authority, there was no necessity, in the protection of the interests of the parties involved, for the imposition of relief beyond suspension of the rates for the full statutory period and an accounting order (Memorandum Opinion and Order, paras. 10, 12).

WHEREFORE, the Motion for Stay should be denied.

Respectfully submitted,
BELL SYSTEM RESPONDENTS

By /s/ Harold J. Cohen
Harold J. Cohen

By /s/ C. Duane Aldrich
C. Duane Aldrich

195 Broadway
New York, New York 10007

Their Attorneys

December 30, 1969

721

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of)

AMERICAN TELEPHONE AND TELEGRAPH)
COMPANY, LONG LINES DEPARTMENT)

DOCKET NO. 18128

Revisions of Tariff F.C.C. No. 260,)
Private Line Services, Series 5000)
(TELPAK))

MEMORANDUM OPINION AND ORDER

Adopted: January 16, 1970 ; Released: January 19, 1970

By the Commission: Commissioner Johnson concurring in part and dissenting in part for the reasons stated in his opinion, 20 FCC 2d 383, 390 (1969).

1. The Commission has before it for disposition numerous petitions for reconsideration, and associated petitions, 1/ directed at our Memorandum Opinion and Order of November 6, 1969, in Docket 18128 (20 F.C.C. 2d 383). 2/

2. A petition for reconsideration of the November 6, 1969 order was filed by the Air Transport Association of America, United Air Lines, Inc., Eastern Air Lines, Inc., and Emery Air Freight Corporation (Airline Parties) on November 18, 1969, requesting reconsideration of that order insofar as it denied a previous Airline Parties petition "to reject, or require or secure withdrawal of, further Telpak rate increases." 3/ The Airline Parties requested reconsideration of the above noted order because they state that the Commission has committed error by allegedly trying to negotiate rate levels for specific services as a part of the continuing surveillance

1/ A list of all petitions and responsive pleadings is contained in Attachment A.

2/ That order suspended Telpak tariff revisions filed on October 1, 1969, to be effective November 1, 1969, until February 1, 1970, and also allowed the Series 11000 tariff offering to become effective as scheduled by the American Telephone and Telegraph Company (AT&T).

3/ As noted in Appendix A, Aerospace Industries Association of America, Inc. (AIA), filed a responsive pleading to the Airline Parties petition. AIA, while neither supporting the petition nor opposing it, requested that action on that petition be taken before January 2, 1970, so that there would be a final Commission order on which judicial review could be sought. The Commission considered the AIA petition to

procedures used in reviewing the Bell System's interstate operations. In this respect, the Airline Parties cite our press release of November 5, 1969 (FCC 69-1210) in which we stated that as a result of our continuing surveillance of the Bell System's interstate operations, rate reductions for interstate long distance telephone calls would be filed totalling \$150 million per year. It was also noted in that release that in addition to the \$150 million reduction, AT&T had previously agreed to file reductions for interstate long distance telephone calls of about \$87 million representing an offset to increases in revenues from higher rates proposed by AT&T for television and audio transmission, Telpak and TWX services. The Airline Parties argue that the mention of the offset in the press release concerning reductions secured by means of the continuing surveillance procedures represents an expression by the Commission that the private line increases are lawful and that the issues in those proceedings concerning the rate increases in question have been prejudged. The \$87 million figure was included in the announcement of the \$150 million reduction for purposes of clarification so that the public would be advised that the \$150 million rate reduction was separate and apart from the offsetting reductions to be offered by the company.

3. The Airline Parties' petition thus completely disregards the fact that the approximately \$87 million offset is completely independent of and unrelated to the reductions resulting from the continuing surveillance. The increased private line rates resulted from cost studies made by AT&T as a result of phase 1-B of Docket 16258 and allegedly are in conformance with the Statement on Ratemaking Principles and Factors agreed to by the parties to that proceeding. 4/ These studies had been instituted in the early part of 1969 and, therefore, antedated the continuing surveillance actions by several months. In addition, the rates proposed as a result of the studies and the total amount of the increase was solely the responsibility of AT&T. These carrier initiated rates were not subject to prior Commission or staff approval.

4. The fact that AT&T is offsetting the increased private line rates with decreases in MTT and WATS rates results from the position taken by the Commission's staff early in 1969 when AT&T first determined that it would make new cost studies of all of its interstate services. At that time, the staff took the position that inasmuch as

3/ (Continued) be of merit but because of subsequently filed petitions for reconsideration, and the time necessary for responsive pleadings, action before the January 2nd date was not possible. The National Association of Motor Bus Owners (NAMBO) also filed a petition for reconsideration. Since that petition raises the same arguments as the Airline Parties, the disposition of the Airline Parties' petition will be applicable to both.

4/ The Statement is contained in Appendix A of our Memorandum Opinion and Order adopted July 29, 1969, 18 F.C.C. 2d 761, 765. As noted in that order, the Commission has not approved the Statement and reserves judgment as to the proper principles and factors that should be applied in individual proceedings.

the Commission had just recently determined what the proper range for AT&T's rate of return was, and had ordered adjustments in the overall interstate earnings of the company, any increase in rates which resulted in an increase in the total interstate revenues would increase earnings above the levels found to be reasonable and would be contrary to the findings and conclusions reached in that decision. AT&T agreed that any increase in revenues for any service resulting from rate adjustments would be accompanied by such adjustments in rates to other services as would result in an offsetting reduction in revenues, so that the company's overall rate of return would not be altered. It is to be stressed that the proposal of the increased private line and the decrease in MTT and WATS rates was solely AT&T's. The Commission's staff participation merely insured that the company's overall return would not be altered as a result of any adjustments to the rates for any interstate service which may have been indicated by the study results. The \$87 million reduction in long distance telephone calls when coupled with the increases in rates to the other services, represents a maintenance of AT&T's overall rate of return. Thus, while AT&T's overall revenues were unaffected, customers for AT&T's other services received the benefits of offsetting rate reductions. What the Airline Parties request of the Commission is a determination, before hearing of the relative equities affecting the various customers of AT&T's service. This we will not do.

5. The reductions that resulted from the continuing surveillance, on the other hand, represent a reduction in AT&T's overall earnings. In permitting the reduction totalling \$150 million to become effective, we considered cost of capital and the level and trends in the carrier's revenues, expenses and earnings and the other relevant factors affecting rate of return. The \$87 million offset did not enter into the consideration of the final amount of the reduction that was made since this offset would not in any way change AT&T's overall rate of return -- the only question discussed at the continuing surveillance sessions.

6. The Airline Parties also state in their petition that once the higher private line rates go into effect and the interstate long distance call rates are reduced, there is little realistic likelihood that the increases will be held unlawful. In response, it can only be stated that the increased rates filed by AT&T must withstand the statutory tests of Sections 201(b) and 202(a) of the Communications Act. If, in Docket No. 18128, the increased rates are ultimately held to be unlawful, and a reduction is ordered, a refund, with interest, of all increased amounts received by the carrier may be made. AT&T has no resort to any argument that such rates were part of an offset

arrangement. 5/ These rates, as all rates filed by carrier initiative, must meet the statutory requirements. Accordingly, for the reasons stated above, we are denying the Airline Parties' petition.

7. The Airline Parties also filed a motion requesting the Commission to stay the effective date of the November 6, 1969 Memorandum Opinion and Order and the effectiveness of further Telpak rate increases pending disposition of their petition for reconsideration, and, in the event that petition was denied, until the conclusion of all proceedings on judicial review.

8. As stated above, we are denying the Airline Parties' petition for reconsideration herein. Therefore, the only matter left for consideration is whether the Telpak rate increases, scheduled to become effective February 1, 1970, should be stayed. In support of their motion, the Airline Parties allege that the airlines will suffer irreparable injury if the proposed change in telegraph/telephone equivalency ratio and the proposed changes in line haul and terminal charges are allowed to become effective. These injuries will, allegedly, cause substantial disruption of vital services rendered to the public and rendered by ARINC to the airlines industry.

9. The Airline Parties do not present convincing evidence that irreparable injury will occur. There has been no showing as to the amount of service that will no longer be provided to the public nor the amount of curtailment of inter and intracompany communications. The sole presentation of the Airline Parties is directed to the fact that the proposed Telpak rates constitute substantial increases. In the instant fact situation, we do not believe that this alone constitutes irreparable injury.

10. The Telpak users have long been aware that AT&T considered a higher level of Telpak rates was justified. In this respect, AT&T filed Telpak rate increases on February 1, 1968, to be effective May 1, 1968. This filing, which was substantially the same as the February 1, 1970 rates, was withdrawn and superseded by the now effective rates which constituted a lesser increase. In addition to long standing notice of AT&T's intention to raise Telpak rates, the Commission has advised the Telpak users that in light of the constant litigation surrounding the Telpak tariff such users

5/ Indeed, AT&T in its opposition to the Airline Parties' petition has stated: "To the extent that the October 1 Telpak rates or the revised TWX or Program rates, may be found ultimately to be excessive there is nothing to prevent the Commission from ordering the filing of revised rates and the refund of amounts unlawfully collected prior thereto, and there is nothing in the Commission's conduct of the continuing surveillance proceeding which would in any way compromise its ability to make such findings or others."

should prepare their communication budgets for the contingency of Telpak rates increases or even the elimination of the service. 6/ Further, the lawfulness of Telpak rates has been the subject of investigation since these rates were first filed and indeed the rates were found to be discriminatory by this Commission. 7/ The petition of the Airline Parties avers that this Commission has prejudged the lawfulness of the Telpak rates. This we have not done. In this regard, it should be noted that while the Commission could have ordered the elimination of Telpak in its 1964 decision because of a lack of sufficient evidence of the compensatory nature of the Telpak C and D rates, we chose to continue our investigation into this issue.

11. The Commission has made no decision as to the lawfulness of the Telpak tariff offering or the specific rates provided for therein. The thrust of the discussion above is directed to the fact that the Telpak users have not been caught by surprise in a situation where unexpected rate increases were proposed by the carrier. Therefore, in this situation we believe the rights of the Telpak users will be sufficiently protected by the accounting order that was entered, and will deny the motion for stay. 8/

12. A second petition for reconsideration was filed by the Bethlehem Steel Corporation, E. I. duPont de Nemours and Company, Ford Motor Company, Monsanto Company, Olin Corporation, Republic Steel Corporation, Union Carbide Corporation, United States Steel Corporation and Westinghouse Electric Corporation (Bethlehem Steel, et al.). The petition requests reconsideration of the above-mentioned order of November 6, 1969 on the grounds that the Commission has prejudged the lawfulness of the Telpak rates scheduled to become effective February 1, 1970; that the proposed Telpak rates are without

6/ See our Memorandum Opinion and Order instituting the proceeding; FCC 68-388, released April 12, 1968.

7/ See the Telpak case, 37 F.C.C. 1111 (1964).

8/ While, in the exercise of our discretion, we do not consider it warranted in the circumstances of this case to grant the relief sought by the Airline Parties, such action is not considered dispositive of the extent of our authority with respect thereto. The burden of demonstrating that we should exercise this extraordinary relief is on the party urging that such action be taken. We do not consider that that burden has been met.

cost support; and that if the proposed Telpak rates are allowed to become effective the increased communications costs will have an adverse effect on industrial and commercial operations which depend on communications furnished under Telpak. On these three bases, Bethlehem Steel, et al., request that the Commission endeavor to induce further postponement of the Telpak rate increases and to encourage either the maintenance of the present charges or the development of an alternative rate schedule. In the alternative, Bethlehem Steel, et al., request that the effective date of the Telpak rate increases be rescheduled until 60 days after the completion of the investigation in Docket 18128.

13. We are of the opinion that the petition for reconsideration should be denied for the following reasons. First, as has been discussed above, there are no grounds for alleging that the Commission has prejudged the lawfulness of the proposed Telpak rate increases. See paras. 2 through 6 supra. As to the second point, Bethlehem Steel, et al., argues that AT&T's own cost studies show that the presently effective Telpak rates would produce a "profit" in 1971, and that the proposed rates would produce even a greater "profit." The cost study to which Bethlehem Steel, et al., refer purports to be a long-run incremental cost study. The Commission has not determined that such costs are a correct tool for pricing the Telpak service, or any other service offering, nor how such costs should be related to the corresponding rates. The additional question of whether the AT&T long-run incremental cost study employed correct methodology has yet to be determined. Accordingly, the Commission is unable to decide before hearing that the proposed Telpak rates are unlawful.

14. The third objection to the Telpak rate increases raised by Bethlehem Steel, et al., is likewise without merit. The allegations of Bethlehem Steel, et al., that the Telpak service has enhanced the manufacturing and commercial operations throughout the United States, that improvements in efficiency will redound to all the people of the United States, and that the proposed Telpak rates will have a damaging effect upon the level of industrial efficiency are without substantial support at this time. Further, assuming that such allegations could be proven correct, we are unable to state now that such facts would constitute a sufficient basis for maintaining the existing, or ordering a lower, level of Telpak rates.

15. The Penn Central Transportation Company (Penn Central) filed a petition for reconsideration and clarification or modification of the accounting order contained in our above-mentioned Memorandum Opinion and Order of November 6, 1969. That order requires the carriers to keep account of all amounts received by virtue of the Telpak rates which will become effective February 1, 1970. The clarification requested would go to the proposed changes

in telegraph/telephone equivalency ratios in the suspended Telpak rate filing. Penn Central states that because of the change in equivalency ratio, major reconfiguration of Telpak groupings will be required. In many cases, it argues, the channel requirements presently served under Telpak would have to be priced under other private line offerings. Therefore, Penn Central argues it is conceivable that during the period of investigation in Docket 18128 it will pay to the carriers substantial amounts over and above that which would have been required for Telpak configurations based upon the rates and regulations ultimately found lawful.

16. The very nature of identification of channels that are at this date affected by the change in equivalency ratios, and channels added in the future that may be affected thereby, contains sufficient questions of fact that an accounting order is not well suited to such changes. Rather, a complaint requesting damages filed by each party affected by the equivalency ratio change would seem to be the most efficient way of handling the problem. Since Penn Central claims it is able to keep detailed records of the channels used by it that would have been included in Telpak sections, the nature of the damages alleged and the extent therefore, should not present the problems of specificity foreseen by Penn Central. Further, a modification of the type requested by Penn Central would create additional burdens both for the carriers and the parties. For example, each affected party would be required to file monthly reports showing the channels that were priced at other than the least expensive rate to the user because of equivalency ratio changes and the dollar effect of such changes. Also extensive and continuous consultation would be necessary among the Commission staff, the various parties and the carriers over the specific accounting procedures to be used. This would be unwieldy. For these reasons, and particularly because satisfactory alternatives for identifying such damages are available, the petition filed by Penn Central is being denied.

17. The Commission also has before it a motion by Aerospace Industries Association of America, Inc. (AIA) requesting that the Commission specify a rate of interest that would be applied to any refunds ordered as a result of this proceeding. It also requests that the interest be compounded on a monthly basis. AIA argues that a rate of interest and the method of application should be specified so that (1) all parties and the carriers can plan knowingly and the Commission can, thus, avoid claims that various forms of action might have been taken had the carriers only known that such a "high" rate of interest was to be prescribed, and (2) time-consuming introduction and cross-examination of evidence and filings of pleadings concerning the rate of interest can be avoided.

18. The reasons advanced by AIA are not sufficiently cogent to require the setting of interest rates and the method of application at this date. Interest rates can vary sharply over periods of time as short as a month. Any rate of interest set today to be effective for the length of the proceedings in this docket would be purely arbitrary and probably inequitable to either the carriers or the parties opposing the rate increases. Accordingly, we will defer the question of setting an appropriate rate of interest to be applied to refunds until such time as that contingency confronts the Commission.

19. Microwave Communications, Inc. (MCI) also filed a petition for reconsideration of the November 6, 1969 Memorandum Opinion and Order. MCI requests that the Series 11000 offering be rejected, or in the alternative, that a special expedited proceeding be instituted to determine the lawfulness of the offering. 9/

20. The basis for MCI's petition is that Series 11000 allegedly is identical to the discontinued Telpak A and the present Telpak C offerings of AT&T. MCI further argues the apparent distinctions between Telpak and Series 11000 stated in our order of November 6, 1969, are illusory. We disagree. The thrust of our discussion of Telpak and Series 11000 in that order was directed to the basic structure of the two offerings. Telpak is a pricing arrangement for ordinary private line channels. The justification for the reduced rate is based on competitive necessity rather than on cost of service. Series 11000, on the other hand, allegedly uses a method of providing the service that is sufficiently different from Telpak and other private line services so that it is claimed that sufficient cost differences exist to justify the differential in rates. Whether such differences exist or not is a question of fact that we expect will be aggressively tested by parties to this proceeding. But we are unable on the facts before us now to state that such differences do not exist.

21. We are unable to agree with MCI that Series 11000 offering should be given a separate, expedited hearing. As noted in their petition Series 11000 is intimately connected with the whole question of proper private line pricing structure. Accordingly, nothing would be gained by detaching one part of an overall structure in an attempt at expedition.


9/ MCI also filed a petition requesting that the Commission stay the effective date of the experimental Series 11000 tariff offering. Inasmuch as the Series 11000 offering had become effective before the petition for stay was filed, the petition is being dismissed as moot.

22. MCI-New York West, Inc. (MCI-NYW) filed a petition for reconsideration of the November 6, 1969 Memorandum Opinion and Order insofar as that order allowed the experimental Series 11000 tariff offering to become effective. The basis for the petition is grounded in radio frequency spectrum rights. MCI-NYW states that it presently has applications before this Commission for radio frequencies between New York and Chicago and that AT&T has served notice that it intends to object to these applications on the grounds, inter alia, that if such applications are granted normal growth of AT&T facilities will be interfered with. MCI-NYW argues that the Ashbacker doctrine (Ashbacker Radio Corp. v. Federal Communications Commission, 326 U.S. 327 (1946) requires rejection of Series 11000 since if it is not rejected AT&T will occupy radio frequencies and later put MCI-NYW into a hearing on its application on the grounds of future blockage of these frequencies.

23. The Ashbacker doctrine requires that mutually exclusive applications be considered comparatively. AT&T has stated that no new applications will be required to provide the Series 11000 service and in fact none are before the Commission. Therefore, since no AT&T application is before us, the Ashbacker doctrine is not applicable. Accordingly, the MCI-NYW petition is being denied. 10/

24. Accordingly, IT IS ORDERED that the petitions and motions contained in Appendix A, with the exception of the petition for stay filed by Microwave Communications, Inc. are hereby denied. Microwave Communications, Inc.'s petition for stay is hereby dismissed.

FEDERAL COMMUNICATIONS COMMISSION


Ben F. Waple,
Secretary

Attachment: Appendix A

10/ It should be noted that if it is determined that additional Section 214 authority or radio licenses are required to provide the Series 11000 services, these applications and radio licenses will be subject to opposition by any interested party just as would any other application or radio license.

APPENDIX A

1. "Petition for Reconsideration Predicated Principally upon New Facts Reflecting Basic Misconceptions and Resulting in Apparent Prejudgment" filed by The Air Transport Association of America, United Air Lines, Inc., Eastern Air Lines, Inc., and Emery Air Freight Corporation on November 18, 1969.
2. "Opposition to Petition for Reconsideration" filed by the American Telephone and Telegraph Company on December 2, 1969.
3. "Comments of Aerospace Industries Association of America, Inc., Concerning Petition for Reconsideration" filed on November 28, 1969.
4. "Opposition to Petition for Reconsideration of 'Airline-Industry Parties'" filed by The Western Union Telegraph Company on November 26, 1969.
5. "Motion of Aerospace Industries Association of America, Inc., to Amend Order Providing for Suspension of American Telephone and Telegraph Company's Increased Rate Filings for Its Private Line Services, Series 5000 (Telpak)" filed on November 19, 1969.
6. "Opposition" filed by the American Telephone and Telegraph Company on December 3, 1969.
7. "Reply to AT&T Opposition to Motion of Aerospace Industries Association of America, Inc. to Amend Order to Specify the Rate of Interest" filed December 5, 1969.
8. "Petition of Penn Central Transportation Company for Reconsideration and Clarification or Modification of Accounting Order" filed on December 5, 1969.
9. "Opposition" filed by the Bell System Respondents on December 23, 1969.
10. "Reply to Opposition" filed by the Association of American Railroads on January 5, 1970.
11. "Reply to Opposition" filed by the Penn Central Transportation Company on December 31, 1969.
12. "Petition for Reconsideration" filed by MCI-New York West, Inc., on December 8, 1969.
13. "Petition for Stay" filed by Microwave Communications, Inc., on December 8, 1969.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

40948

FCC 70 - 101

In the Matter of)

AMERICAN TELEPHONE AND TELEGRAPH COMPANY)

Revisions to American Telephone and Telegraph
Tariff F.C.C. No. 259, Wide Area Telecommunica-
tions Service, and Tariff F.C.C. No. 263, Long
Distance Message Telecommunications Service)

MEMORANDUM OPINION AND ORDER*

Adopted January 28, 1970 ; Released January 30, 1970

By the Commission: Commissioner Johnson concurring in the result.

1. The Commission has before it a Petition for Hearing and Suspension of Proposed Tariff Revisions Re Message Toll Telephone Service and for Prescription of Interim Change in Separations Procedures filed by the National Association of Regulatory Utility Commissioners (NARUC) on January 13, 1970. NARUC requests that the above-captioned tariff revisions filed on January 2, 1970, to become effective February 1, 1970, be suspended for three months, a hearing be instituted to investigate the lawfulness of the proposed revisions, and, during the interim, changes be made in the jurisdictional separations procedures. In support of its petition, NARUC argues that the \$87 million reduction proposed in the above-captioned tariff revisions is in fact a reduction in the Bell System's interstate earnings and that such an earnings reduction will favor only a relatively small, affluent class of telephone users while adversely affecting the users of intrastate telephone service.

2. The NARUC petition is not well-founded in fact. The \$87 million reduction in the MTT and WATS services will not result in a reduction of the Bell System's interstate earnings. This reduction is coupled with rate increases in the Bell System's TWX, program transmission and private line services of approximately the same magnitude. The effect of the tariff revisions in all of these services is to change the relative earnings of each class of service and will have no effect on the Bell System's overall rate of return on interstate operations ¹/₁. Therefore, we find no merit to the conclusion that intrastate users of

¹/See our Memorandum Opinion and Order in Docket No. 18128 released January 19, 1970 (FCC 70-75).

* Not part of record certified by Commission.

communications will be in any way burdened by the tariff revisions in question.

3. The contentions contained in the instant petition do not differ materially from those made by NARUC in a previous petition in which it sought suspension or rejection of tariff schedules effective January 1, 1970, designed to reduce the interstate rates in the amount of \$150,000,000 annually. This petition was denied by the Commission by its Memorandum Opinion and Order of December 23, 1969 (FCC 69-1407). Moreover, the arguments of NARUC apply with even less force to the tariff schedules here in question, since they are designed to offset increases in rates for other services previously filed and will result in no net change in revenues for interstate services.

4. With respect to NARUC's request that changes be made in jurisdictional separations procedures to shift revenue requirements from intrastate to interstate jurisdiction in lieu of the instant rate reduction in message toll and WATS rates, such a change may not be made except through the rule-making procedures prescribed by the Administrative Procedure Act, as implemented by our rules. As we stated in our previous Memorandum Opinion and Order:

"NARUC's petition for rule-making was placed on public notice on December 12, 1969 (RM-1543). In this connection, we have suggested to NARUC that, to facilitate expedition, the NARUC-FCC staff committee of technical experts be convened as soon as possible in order to consider the proposed changes. We have also urged that such meetings commence as early in January as possible. We have again stated, as we indicated in our Report and Order of January 29, 1969, in Docket No. 17975, that we intend to continue our cooperation with the NARUC and look to these joint studies as the prime forum for providing the expertise and guidance required in this complex area of separations procedures. In the meantime, we see no need to deprive the public of the benefits of the substantial rate reductions now scheduled to go into effect on January 1, 1970. So far as any change in separations procedures is concerned, if rate adjustments should prove to be necessary as a result of any separations changes which may eventuate, such adjustments may be made at the appropriate time."

5. Accordingly, IT IS ORDERED, That, for the reasons set forth in our previous Memorandum Opinion and Order, supra, the Petition of NARUC IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

969

BRIEF FOR PETITIONER
NATIONAL ASSOCIATION OF MOTOR BUS OWNERS

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 23,833, 23,836, 23,839, 23,841, 23,842, 23,843

THE ASSOCIATED PRESS,
AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC.
AIR TRANSPORT ASSOCIATION OF AMERICA, et al.,
AMERICAN TRUCKING ASSOCIATIONS, INC.,
AERONAUTICAL RADIO, INC.,
NATIONAL ASSOCIATION OF MOTOR BUS OWNERS,
Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
THE WESTERN UNION TELEGRAPH COMPANY,
Intervenors

Petitions for Review of Orders of the
Federal Communications Commission
United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 30 1970

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 23,833, 23,836, 23,839, 23,841, 23,842, 23,843

THE ASSOCIATED PRESS,
AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC.
AIR TRANSPORT ASSOCIATION OF AMERICA, et al.,
AMERICAN TRUCKING ASSOCIATIONS, INC.,
AERONAUTICAL RADIO, INC.,
NATIONAL ASSOCIATION OF MOTOR BUS OWNERS,
Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
THE WESTERN UNION TELEGRAPH COMPANY,
Intervenors

**Petitions for Review of Orders of the
Federal Communications Commission**

**BRIEF FOR PETITIONER
NATIONAL ASSOCIATION OF MOTOR BUS OWNERS**

STATEMENT OF ISSUES PRESENTED

The orders of the Federal Communications Commission under review denied the request of petitioner National Association of Motor Bus Owners (NAMBO) and others for rejection of certain TELPAK rate increases filed by the

American Telephone and Telegraph Company, Long Lines Department (A.T.&T.). The questions presented for review are:

1. Whether the Commission's off-the-record agreement with A.T.&T. to couple rate decreases in one class of service with rate increases in TELPAK and other services, when such rate increases were the subject of undetermined adjudicatory proceedings, constituted a prejudgment or apparent prejudgment of such proceedings.
2. Whether the Commission should have permitted A.T.&T. to increase TELPAK rates on an interim basis prior to hearing when the only determination after hearing made to date by the Commission concerning A.T.&T.'s interstate rates is that, from an overall standpoint, the carrier has been earning an excessive rate of return.
3. Whether the Commission should have permitted A.T.&T. to pyramid successive TELPAK rate increases, amounting in total to an increase of more than 100%, during the pendency of proceedings to determine the lawfulness of the original TELPAK rates in effect prior to such increases.
4. Whether accounting is an adequate remedy to protect users if the Commission ultimately sustains the contention of petitioner and others that such increases are unlawful.
5. Whether this Court has the power to review and remedy the arbitrary and capricious refusal of the Commission to prevent the pyramiding of TELPAK rate increases prior to hearing.

This case has not previously been before this Court on the merits. A motion for stay was denied by a panel of the Court on January 29, 1970. Part of the background of this case is found in *American Trucking Associations v. FCC*, 126 U.S. App. D.C. 236, 377 F.2d 121 (1966), *cert. denied* 386 U.S. 943 (1967).

REFERENCES TO RULINGS

The rulings of the Federal Communications Commission involved in this proceeding are Memorandum Opinion and Order, FCC 69-1196, 20 F.C.C. 2d 383, adopted October 29, 1969 and released November 6, 1969 (J.A. 558),¹ and Memorandum Opinion and Order denying petitions for reconsideration, FCC 70-75, 21 F.C.C. 2d 1, adopted January 16, 1970 and released January 19, 1970 (J.A. 724).

STATUTES AND RULES INVOLVED

Pertinent provisions of the Federal Communications Act of 1934, as amended, the Administrative Procedure Act, and the Rules and Regulations of the Commission are set forth in Appendix A to this brief.

STATEMENT OF THE CASE

TELPAC is a bulk offering of private line communications service which permits a user to lease from the carrier up to 60 (TELPAC C) or 240 (TELPAC D) voice-equivalent channels. It is used by many large volume communications customers of A.T.&T., such as Federal and state governments, government-regulated carriers (the airlines, the railroads, the truckers and the motor bus operators), the press, the aerospace industry and other major industries in the country. These users employ TELPAK for a variety of communications purposes, including telephone, telegraph and data transmission.

TELPAC was instituted by A.T.&T. in 1961 to meet the needs of the new and expanding market for bulk communications and to meet the competition of private microwave systems. An investigation was instituted in September, 1961, in the *TELPAC Case*, Docket No. 14251, into the lawfulness of the tariff offering. This investigation resulted in the Commission's concluding that there was no justification for the TELPAK A and B portion of the offering, involving smaller numbers of voice-equivalent channels, but

¹ References to the Joint Appendix are preceded herein by "J.A.".

that there "is apparent justification for TELPAK C and D classifications in terms of meeting competition from private microwave systems having channel capacities comparable to those offered by such TELPAK classifications." *TELPAK Case*, 38 F.C.C. 370, 395 (1964), 37 F.C.C. 1111, 1118 (1964). The Commission, however, was unable to determine on the record in that proceeding whether the rates for TELPAK C and D were compensatory and reserved that issue for further hearing and decision. On appeal, this Court affirmed. *American Trucking Associations v. FCC*, 126 U.S. App. D.C. 236, 377 F.2d 121 (1966), *cert. denied* 386 U.S. 943 (1967).

Six years later the question of the compensatory nature of the original TELPAK C and D rates is still unresolved. Despite the urging of user groups that this issue be determined in the then existing Docket 14251 proceeding, the Commission instead included the issue in the *A.T.&T. General Rate Investigation*, Docket 16258, which had been instituted in regard to all of A.T.&T.'s interstate rates. See FCC 66-1005, 7 F.C.C. 2d 30 (1966) (J.A. 7); FCC 66-1188, 6 F.C.C. 2d 177 (1966) (J.A. 16).

However, the Commission failed to make any determination in Docket 16258 on the TELPAK C and D compensatory issue. The *only* determination made in that lengthy proceeding was that a fair rate of return to A.T.&T. on its interstate operations is in the range of 7 to 7½ percent and that A.T.&T.'s actual rate of return was excessive. FCC 67-776, 9 F.C.C. 2d 30, 88, 114-16 (1967); FCC 67-1047, 9 F.C.C. 2d 960 (1967). The Commission has made no other determination after hearing, either in regard to over-all rate levels or with respect to rates for specific services such as TELPAK, in the six-year period since the *TELPAK* case.

The over-all rate investigation in Docket 16258 also involved, in so-called Phase I-B (the rate of return portion having constituted Phase I-A), consideration of general rate-making principles and factors. This portion ended

with a stipulation on such matters by the parties without any Commission decision. FCC 69-842, 18 F.C.C. 2d 761 (1969). The question of the compensatory nature of the original TELPAK C and D rates was once again deferred, to be included in a new Docket No. 18128 proceeding involving various private line rate increases. While not deciding the matter, the Commission consistently affirmed that the issue of the compensatory nature of such original rates still existed and that the parties were entitled to a hearing and determination on such issue.²

While Docket 16258 was in hearing in Phase 1-B (rate-making principles and factors), A.T.&T. filed and the Commission permitted to become effective, after suspension and subject to accounting, a substantial TELPAK interim rate increase with a hearing to be held thereon in Docket 18128. FCC 68-388 (1968); FCC 68-711, 13 F.C.C. 2d 853 (1968). This was a reduced (but nonetheless very substantial) version of an earlier filing which A.T.&T. had withdrawn after many protests by users (J.A. 134). In permitting the reduced filing to become effective after suspension, the Commission clearly gave the impression that there would be no further rate increases until completion of a hearing on the TELPAK C and D rate issues. Thus the Commission warned TELPAK users that they might expect further increases "in the event a hearing record indicates that increases in the level of TELPAK rates are justified or required", having preceded this warning with a recognition that such an adjudicatory determination had not yet been made:³

"The Commission is cognizant of the fact that the record in Docket No. 16258 is not complete as regards

² Commission statements to this effect can be found in the following orders: *Service Point Case*, FCC 66-71, 2 F.C.C. 2d 359 (1966); *Sports Network Case*, FCC 66-403, 3 F.C.C. 2d 618, 624 (1966), FCC 67R-62 (1967) (Review Board); *TELPAC Case*, FCC 66-1005, 7 F.C.C. 2d 30 (1966), FCC 66-1188, 6 F.C.C. 2d 177 (1966); *TELPAC Sharing Case*, FCC 67-612, 8 F.C.C. 2d 178 (1967); *TELPAC Private Line Case*, FCC 68-388 (1968), FCC 68-711, 13 F.C.C. 2d 853 (1968).

³ FCC 68-388 (1968); FCC 68-711, 13 F.C.C. 2d 853 (1968).

TELPAC C and D, since A.T.&T.'s evidence has not yet been fully examined, and the users of service under the TELPAK tariff, a number of whom are parties intervenor to the proceeding, have not yet had the opportunity to put on their cases in opposition. Presumably, such intervenors will seek to establish that the present rates are in fact compensatory, and that competitive necessity requires their maintenance at the present level. Moreover, we are cognizant of our conclusion in the original TELPAK case that the TELPAK C and D rates were apparently justified by competitive necessity, provided, however, that they be shown to be compensatory."

Despite this implicit moratorium by the Commission on further TELPAK rate increases until the unresolved TELPAK issues could be determined on a hearing record, a little over a year after the effectiveness of the first increase A.T.&T. once again filed a substantial TELPAK rate increase, and the Commission has again permitted it to become effective after suspension in the Memorandum Opinion and Order under review in this proceeding (J.A. 558).

The two A.T.&T. rate filings have resulted in a massive inflation in TELPAK rates in little more than a year's period:

Base Capacity	Original Rates	Rates Effective 9/1/68	Percent Increase	Rates Effective 2/1/70	Percent Increase
TELPAC C	\$25	\$28	12%	\$30	7%
TELPAC D	45	60	33%	85	42%
Service Terminals, Connecting Arrangements	15	25	67%	35	40%
Additional Terminals and Arrangements	5	10	100%	15	50%
Telephone/Telegraph Equivalency	12/1	6/1	100%	2/1	200%

Such a pyramiding of rate increases seriously affects petitioner, its members and the traveling public they serve.⁴ While the over-all effect on TELPAK users is to more than double their TELPAK charges, the impact on users such as NAMBO's members—who use more telegraph service than voice service—is particularly harsh.⁵ The second rate increase alone will nearly double the over-all TELPAK charges of NAMBO's members, quite apart from the impact of the first increase.

On October 17, 1969 NAMBO filed a petition requesting the Commission to reject, reschedule the effective date or take such other action as it deemed appropriate to hold in abeyance the October 1, 1969 TELPAK rate increase until resolution of the various issues relating to the TELPAK offering in Docket 18128 (J.A. 496). The Commission did not take any of the actions so requested, nor did it in its Memorandum Opinion and Order under review herein pass upon any of NAMBO's contentions (J.A. 558).

In such Memorandum Opinion and Order, released November 6, 1969, the Commission denied the petitions of NAMBO and others for rejection and similar relief, stating that it found "no necessity for the imposition of such ex-

⁴ NAMBO is the national trade association for intercity motor bus passenger carriers. Its membership includes the Greyhound system, all carriers affiliated with the National Trailway system, and more than 400 independent bus operators. NAMBO's members hold authority from the Interstate Commerce Commission for the transportation of persons and property in interstate commerce, pursuant to the Interstate Commerce Act. These motor bus carriers provide about 90 percent of the intercity motor bus transportation in the United States. In addition to the transportation of passengers, these carriers engage in package express and mail service. In providing this transportation, a number of NAMBO's members make considerable use of the TELPAK services of A.T.&T. TELPAK is an important part of the communications system employed by these companies for the operation and control of equipment and the other activities involved in the furnishing of bus transportation.

⁵ Under the TELPAK tariff the user can lease a number of telegraph channels in place of a voice channel. The challenged rate increase reduces this telegraph to voice channel equivalency from a 6 to 1 ratio down to a 2 to 1 ratio. This has virtually the same effect as tripling the telegraph rates.

traordinary relief" but, at the same time, emphasizing that "we are not deciding at this time the extent of our authority to grant the kind of relief petitioners request." (J.A. 562).

On November 5, 1969, one day prior to the release date of the Memorandum Opinion and Order under review, the Commission released a Public Notice announcing the results of its "continuing surveillance" meetings between A.T.&T., the Commission and its staff (J.A. 572). For the first time, it was revealed that the TELPAK increases were tied together with message toll rate reduction which supposedly had been the only subject of the non-public surveillance meetings. In the release, the Commission referred to message toll service rate reductions of \$150 million and \$87 million, the latter "representing an offset to increases in revenues resulting from higher rates recently filed for program transmission, Telpak and teletypewriter exchange (TWX) services when the latter increases become effective." (J.A. 572). The Commission then gave its blessing to the entire package, stating: "The Commission anticipates that the new rates will permit the companies to achieve earnings in a range needed to attract capital under today's conditions" (J.A. 572).

Commissioner Johnson's Separate Statement revealed that the total impact of the entire package (i.e., reductions plus increases) was *negotiated* between the FCC and the Bell System. Thus Commissioner Johnson stated that "the majority [of the FCC] was seeking \$290 million through negotiations conducted by the staff and the Telephone Committee", this amount consisting of "\$200 million in reduction plus the \$85-90 million MTT reductions as offsets to the other rate increases Bell has filed" (J.A. 579-580). Commissioner Johnson indicated that "Bell as a counter offered \$120 million plus the offsets", or a total of \$207 million (J.A. 580). Commissioner Johnson stated that Bell finally agreed to a package of \$50 million less than the Commission initially sought (J.A. 579). This package, of

course, contained the \$87 million rate increase in Telpak, program and TWX services (J.A. 579). Commissioner Johnson also revealed that "the content of the FCC majority's press release was negotiated with Bell officials who are clearly concerned as much with publicity as with profits" (J.A. 576).

As a result of such disclosures, NAMBO on December 8, 1969 filed a petition for reconsideration contending that the Commission had prejudged the TELPAK rate increase here involved (J.A. 658). Other parties also sought reconsideration on comparable grounds.

In a letter dated December 31, 1969, A.T.&T. advised the Commission that A.T.&T. would file the message toll service rate reductions on January 2, 1970 and requested special permission to cancel the tariff filing on not less than one day's notice if the offsetting TELPAK and other rate increases did not become effective on February 1, 1970 (Application No. 739). Special permission was granted on the same day as the letter request (Letter, Reference 9310, from Chief, Common Carrier Bureau, to A.T.&T.).

By Memorandum Opinion and Order adopted January 16, 1970, released January 19, 1970, also involved in this review proceeding, the Commission denied the various petitions for reconsideration and for other relief, and permitted the TELPAK increase to become effective on February 1, 1970 (J.A. 724).

On January 5, 1970 NAMBO filed in Case No. 23,843 a petition for review of the Commission's Memorandum Opinion and Order released November 6, 1969. On January 26, 1970 NAMBO filed a motion to amend its petition for review to include review of the Memorandum Opinion and Order released January 19, 1970. This motion was granted February 13, 1970.

On January 26, 1970, the Court consolidated Cases Nos. 23,833, 23,836, 23,839, 23,841, 23,842 and 23,843, and per-

mitted the American Telephone and Telegraph Company and The Western Union Telegraph Company to intervene. On January 29, 1970, a panel of the Court heard oral argument and denied motions by petitioner and others for injunction and for stay pending review.

SUMMARY OF ARGUMENT

This case involves serious questions of prejudgment or apparent prejudgment. In the course of the Commission's "continuing surveillance" meetings with A.T.&T. in order to negotiate decreases in message toll service rates, it has become apparent that the TELPAK C and D rate increase here involved was included as part of such negotiations. This conclusion is compelled both by the language of the Commission's announcement of the results of such informal surveillance proceedings and most particularly by the Separate Statement of Commissioner Johnson which described the negotiations in a step-by-step fashion.

The TELPAK rate increase will be, of course, the subject of an evidentiary hearing in Docket 18128. It is being bitterly contested by petitioner and many other user groups. None of these user group parties was present at the "continuing surveillance" meetings and none had any opportunity to participate in any way in the negotiations between the Commission and A.T.&T.

The package agreement between the Commission and A.T.&T., in which message toll service decreases were coupled with increases in TELPAK and other private line rates, clearly prejudiced the rights of petitioner and others who are parties to the Docket 18128 adversary proceeding. The inference is clear that the Commission has either already approved—or placed itself in a position where it would be extremely difficult to disapprove—the TELPAK rate increase. Such prejudgment is directly contrary to this Court's decisions in *Cinderella Career and Finishing Schools, Inc. v. FTC*, Case No. 22,624 (U.S. App. D.C.

March 20, 1970) and *Texaco, Inc. v. FTC*, 118 U.S. App. D.C. 366, 366 F.2d 754 (1964), *remanded on other grounds*, 381 U.S. 739 (1965), and cannot be permitted to stand.

A rejection of the TELPAK rate increase and a fresh start on the Docket 18128 proceeding are also required for other reasons. Such rate increase was violative of prior Commission policies and determinations and constituted unlawful prejudice to the user group parties quite apart from the prejudgment aspect.

Thus such rate increase was in direct contradiction to the only recent determination the Commission has made *after hearing* in regard to A.T.&T.'s interstate rates, namely, that such rates are excessive in nature from an over-all standpoint. Since the Commission has made no determinations as to proper cost allocations and rate levels for the various classes of service involved in A.T.&T.'s interstate operations, manifestly the over-all "excessive" finding should preclude any interim prehearing rate adjustments for particular classes of service other than downward adjustments.

Further, in permitting the first round of TELPAK increases to become effective, the Commission implicitly established a moratorium on further TELPAK increases until after a hearing on the TELPAK rate issues, including the question of the compensatory nature of the original TELPAK rates in effect prior to any increase. Such a hearing has yet to be held. The filing of the second round of TELPAK increases violates this moratorium. It also prejudices the right of petitioner and other user groups to a full and fair hearing on the original TELPAK C and D rates, since those rates are now buried under two levels of increases.

The accounting procedure established by the Commission for both rounds of TELPAK increases is clearly inadequate to protect petitioner and other user groups, or to protect the public they serve. If the Commission should ultimately require a refund of all increases, petitioner's mem-

bers would get back only a small portion of their losses. Further, such a refund would not cover in any way the indirect cost to such companies of disruptions and impairments in their communications programs as a result of the severity of the rate increases. Both A.T.&T. and the Commission have recognized the inadequacy of accounting. The Commission's suggested supplementary remedy, a complaint for damages, presents many problems in terms of both availability and adequacy. Among other serious problems, it shifts the burden of proof from the carrier to the user, does not cover indirect losses sustained through contraction of communications usage and restructuring of communications systems as a result of the rate increases, and does not adequately protect the public served by petitioner and others.

The Commission had the clear power and duty to reject the TELPAK rate increase here involved. Comparable action has been consistently upheld. *American Commercial Lines, Inc. v. Louisville & N. R.R. Co.*, 392 U.S. 571 (1968); *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *United Gas v. Callery Properties*, 382 U.S. 223 (1965); *F.P.C. v. Texaco*, 377 U.S. 33 (1964). The Commission also has a broad range of authority under several express provisions of the Federal Communications Act which are clearly ample for such rejection action, and has itself exercised such broad authority in another recent proceeding involving circumstances considerably less extraordinary than those presented here. FCC 69-1307 (1969).

This Court clearly has the power to review and remedy the refusal of the Commission to reject the TELPAK rate increase. This is a tariff rejection case. It is not a tariff suspension case. The Court is being asked to review the refusal of a federal agency to reject a rate filing, action which has consistently been reviewed in the past. See, e.g., *United Gas Co. v. Mobile Gas Corp.*, 350 U.S. 332 (1956). The Court is not being asked to review Commission suspension action. Hence *Arrow Transportation Co. v. South-*

ern R. Co., 372 U.S. 658 (1963), which limited judicial review in agency suspension cases, is not applicable to the tariff rejection relief requested in this proceeding. Instead, this case fully meets the test of reviewability established by this Court in *Isbrandtsen Co. v. United States*, 93 U.S. App. D.C. 293, 297-98, 211 F.2d 51, 55-56 (1954), *cert. denied* 347 U.S. 990 (1954). The unlawful, arbitrary and capricious action of the Commission in refusing to reject the TELPAK increase should be reversed and the cause remanded to the Commission for the purpose of rejecting such rate filing.

ARGUMENT

I. The Commission's Off-the-Record Agreement With A.T.&T. To Couple Rate Decreases in One Class of Service With Rate Increases in TELPAK and Other Services. When Such Rate Increases Were the Subject of Undetermined Adjudicatory Proceedings, Constituted a Prejudgment or Apparent Prejudgment of Such Proceedings

The Commission's Public Notice, announcing the results of the "continuing surveillance" meetings, revealed a clear prejudgment of the TELPAK rate increase here involved. This prejudgment was demonstrated both in the text of the Commission's release and in Commissioner Johnson's Separate Statement. The Commission's reference in the release to the fact that the \$87 million message toll service rate reduction was an "offset" to the TELPAK and other private line rate increases, proposed by A.T.&T. (J.A. 572) and its language indicating approval of the totality of such adjustments (J.A. 572) cannot be read in any other manner than as a prejudgment of the Docket 18128 proceeding where the rate increase portion of the adjustments was supposedly to be impartially evaluated.

If there were any doubt about the meaning of the Commission's release, it could certainly be dispelled by Commissioner Johnson's Separate Statement. This Statement clearly showed that the total package of reductions and increases was a matter of negotiation and private agreement

between the Commission and A.T.&T., an agreement reached without consultation with or the knowledge of the user groups contesting the TELPAK rate increase. As Commissioner Johnson has indicated, in the negotiations the Commission was seeking a total package which consisted of \$200 million in message toll service rate increases plus another \$87 million increase in such rates as an offset to the decreases in TELPAK and other private line rates (J.A. 579-580). A.T.&T. offered less, and the parties finally agreed upon decreases totalling \$237 million, \$87 million of which were offsets to the increases (J.A. 579-580).⁶

While the Commission in denying the various petitions for reconsideration asserted that the \$87 million offset was "completely independent of and unrelated to the reductions resulting from the continuing surveillance" (J.A. 725), this self-serving assertion does not change the facts of the negotiations as described by Commissioner Johnson. The Commission has never denied the progress of negotiations and agreement which he described.

None of the user group parties to the Docket 18128 proceeding was present at the "continuing surveillance" meetings. While such meetings may serve some purpose with respect to voluntary reductions in interstate message toll rates in order to keep total interstate revenues more nearly within previously authorized boundaries (e.g., the previously-approved rate of return range of 7% to 7½%),⁷ they

⁶It should also be noted that in addition to the prejudgment of the TELPAK increases as a result of the surveillance proceeding, two of the Commissioners have clearly prejudged over-all TELPAK issues. Thus in the Memorandum Opinion and Order released November 6, 1969 Commissioner Cox referred to the "delay in correcting the discriminatory TELPAK rates" (J.A. 565), and Commissioner Johnson stated:

"Telpak is the service which the Commission has believed could be non-compensatory, that is, its rates do not compensate Bell for its costs and are designed to meet competition from private carriers. Even Bell's studies show a need to raise these rates." (J.A. 566).

⁷The general surveillance approach in such a context has been judicially approved. *Public Utilities Com'n of State of Cal. v. U. S.*, 356 F. 2d 236 (9th Cir. 1966).

can serve no proper function in relation to contested rate increase filings. Had the Commission through the surveillance procedure simply approved a reduction in message toll revenues without regard to offsetting increases in other rates, no basis of complaint as to the absence of a hearing would likely exist. But when the Commission ties \$87 million of reduction for the message toll users—which is a firm reduction not subject to accounting—to \$87 million of contested increases in other rates—supposedly subject to accounting and refund—the Commission has put itself in a compromised and indefensible position.

A package arrangement of rate changes (some under surveillance and others in pending contested proceedings) simply cannot be accomplished without prejudice to the rights of the parties to the adversary proceeding. The inference is too clear that the Commission has already approved the \$87 million in TELPAK and other private line rate increases. This approval must have been clear to A.T.&T.—otherwise that carrier would not have agreed to the package—and it is now very apparent to the adversely-affected parties to Docket 18128.

This Court has made its position clear on agency prejudgment. See, e.g., *Cinderella Career and Finishing Schools, Inc. v. FTC*, Case No. 22,624 (U.S. App. D.C. March 20, 1970); *Texaco, Inc. v. FTC*, 118 U.S. App. D.C. 336, 366 F.2d 754 (1964), *remanded on other grounds*, 381 U.S. 739 (1965). In both cases, the evidence of prejudgment was found in a public speech of a member of the Federal Trade Commission, and in each case this Court held that the member should have been disqualified from participation. This Court emphasized the dangers of “apparent” as well as “actual” prejudgment. In the *Texaco* case, Circuit Judge Washington in a concurring opinion stated:⁸

“Once an adjudicator has taken a position apparently inconsistent with an ability to judge the facts fairly,

⁸ 118 U.S. App. D.C. at 376, 336 F. 2d at 764.

subsequent protestations of open-mindedness on his part cannot restore a presumption of impartiality. Whether justice was in fact done is not the issue: an administrative hearing 'must be attended, not only with every element of fairness but with the very appearance of complete fairness.' We must presume that a fair hearing was denied if a disinterested observer would have reason to believe that the Commissioner had 'in some measure adjudged the facts * * * of a particular case in advance of hearing it.' "

The same viewpoint was expressed by this Court in the *Cinderella* case:⁹

"It requires no superior olfactory powers to recognize that the danger of unfairness through prejudgment is not diminished by a cloak of self-righteousness. We have no concern for or interest in the public statements of government officers, but we are charged with the responsibility of making certain that the image of the administrative process is not transformed from Rubens to a Modigliani.

"The test for disqualification has been succinctly stated as being whether 'a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.' "

The prejudice resulting from actual or apparent prejudgment of the TELPAK rate increase by the Commission can only be cured by a rescinding of such rate increase and a fresh start on the Docket 18128 proceeding unencumbered with any previously-approved (or apparently previously-approved) rate level as part of the issues. The total amount of rate reduction in message toll service to be accomplished through surveillance process should be determined on its own merits, without relation to rates for other classes of service which are at issue in contested proceedings involving a public hearing.

⁹ Slip opinion, pp. 14, 16.

II. The Commission Should Not Have Permitted A.T.&T. To Increase TELPAK Rates on an Interim Basis Prior to Hearing When the Only Determination After Hearing Made To Date by the Commission Concerning A.T.&T.'s Interstate Rates Is That, from an Over-All Standpoint, the Carrier Has Been Earning an Excessive Rate of Return

In the present posture of the Commission's various evaluations of A.T.&T.'s interstate rates, the Commission clearly cannot properly permit any interim A.T.&T. rate adjustment other than a downward adjustment. The only determination based on a hearing that the Commission has made to date concerning A.T.&T.'s interstate rates is that, from an over-all standpoint, they have been excessive.¹⁰ Recently in the "continuing surveillance" non-public proceeding substantial message toll rate reductions were agreed to by A.T.&T. and despite such reductions, the carrier is likely to achieve a rate of return in 1970 well in excess of that authorized by the Commission (8% to 8.5% as compared to the authorized 7% to 7.5%) (J.A. 572).¹¹ In the face of this situation—earnings far in excess of the authorized rate of return even after the "surveillance" decreases—it is clear that the only proper interim rate adjustments in regard to *any* interstate services are downward adjustments. The Commission has not yet made any determination after hearing which would warrant any other result. Thus no determination has been made as to proper cost allocations as among A.T.&T.'s interstate services. While cost allocation studies have been presented, none of these studies has ever been tested by cross-examination, nor has there been any adjudication of their validity by the Commission. In such a posture, the regulated carrier is not in

¹⁰ FCC 67-776, 9 F.C.C. 2d 30; FCC 67-1047, 9 F.C.C. 2d 960 (1967). The Commission in this phase I-A of Docket 16258 found that A.T.&T. had been earning an excessive rate of return and ordered a reduction in interstate revenues of \$120 million.

¹¹ It should also be noted that the TELPAK rate increase itself was based on an excessive rate of return. In the long run incremental cost approach relied upon by the carrier, a return of 8½% was used (J.A. 488), far above the authorized rate of 7% to 7.5%.

a position to press for interim rate increases on particular services to soften the impact of the over-all interim decrease which is required. *Cf. F.P.C. v. Tennessee Gas Co.*, 371 U.S. 145, 152-3 (1962). The effort by A.T.&T. to pile another interim rate increase on the backs of its TELPAK customers when the only adjudication to date has demonstrated an over-all excess in interstate rates is clearly contrary to the Commission's own determinations and patently inconsistent with proper procedures in rate investigations.

III. The Commission Should Not Have Permitted A.T.&T. To Pyramid Successive TELPAK Rate Increases, Amounting in Total to an Increase of More Than 100%, During the Pendency of Proceedings To Determine the Lawfulness of the Original TELPAK Rates in Effect Prior To Such Increases

There has never been a determination of the basic issue as to the compensatory nature of the original TELPAK C and D rates. The Commission has constantly assured the parties that such an issue still existed and that they were entitled to a determination thereof based on a hearing record.¹² The propriety of the first round of TELPAK rate increases has likewise been deferred and remains to be resolved in Docket 18128, despite the mandate of Section 204 of the Communications Act that the Commission must give to a hearing and decision on whether rate increases are just and reasonable "preference over all other questions pending before it and decide the same as speedily as possible."¹³

Further, there has never been a determination of the applicable general ratemaking principles and factors, of the appropriate over-all rate level for each class of service, and of the relationships of these rate levels among the various classes of service, determinations which the Commission has emphasized are "of threshold essentiality" to a determination of the reasonableness and lawfulness of specific

¹² See Note 2, *supra*.

¹³ 47 U.S.C. § 204.

rates including TELPAK. *TELPAK Private Line Case*, FCC 68-711, 13 F.C.C. 2d 853, 857 (1968) (J.A. 180).¹⁴

Similarly, as previously indicated, there have been no determinations as to proper cost allocations among A.T.&T.'s interstate services. While cost allocation studies have been presented by A.T.&T. at the request of the Commission's Common Carrier Bureau, none of these studies has ever been tested by cross-examination or been subject to rebuttal presentations. The Commission has never adjudicated their validity.

The pyramiding of rate increases while all these issues remain undetermined has seriously prejudiced orderly and efficient procedure and has tended to obscure certain basic issues of importance to user groups. This certainly is the effect on the question of the propriety of the original level of TELPAK rates. As a practical matter, it must be recognized that a full and fair hearing on a particular rate level is considerably impeded when two higher rate levels have been added for consideration in the same proceeding.

The Commission itself appeared to recognize this problem in allowing the first TELPAK rate increase to take effect after suspension. The Commission stated that it was aware "that the record in Docket 16258 is not complete as regards TELPAK C and D" and recognized that user groups will seek to establish that the original TELPAK rates "are in fact compensatory". FCC 68-388 (1968); FCC 68-711, 13 F.C.C. 2d 853 (1968). The Commission also stated that "we are cognizant of our conclusion in the original TELPAK case that the TELPAK C and D rates were apparently justified by competitive necessity, provided, however, that they be shown to be compensatory." *Ibid.*

¹⁴ See also *Service Point Case*, FCC 66-71, 2 F.C.C. 2d 359 (1968); *Sports Network Case*, FCC 66-403, 3 F.C.C. 2d 618, 624 (1966), 67R-62 (1967) (Review Board); *TELPAK Case*, FCC 66-1005, 7 F.C.C. 2d 30 (1966), FCC 66-1188, 6 F.C.C. 2d 177 (1966); *TELPAK Sharing Case*, FCC 67-612, 8 F.C.C. 2d 178 (1967).

The Commission then warned TELPAK users that they might expect further increases "in the event a *hearing record* indicates that increases in the level of TELPAK rates are justified or required". *Ibid.* (Emphasis supplied.) The impression given by these statements is that there would be no further rate increases until completion of a hearing on the TELPAK C and D rate issues. This "moratorium" was clearly justified and manifestly should have been adhered to by the Commission in its consideration of the second round of increases filed by A.T.&T. little more than a year later. Its failure to do so worked substantial injury on TELPAK users such as NAMBO and clearly denied them an opportunity for the fair hearing on basic TELPAK issues which they had long been promised and to which they are clearly entitled.

**IV. Accounting Is Not an Adequate Remedy To Protect Users
If the Commission Ultimately Sustains the Contention of
Petitioner and Others That the TELPAK Increases Are
Unlawful**

Although the Commission has ordered an accounting by A.T.&T. of the second TELPAK rate increase, as well as the first, it is universally recognized that such accounting and refund provisions do not afford adequate protection to consumer interests. *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 154-55 (1962). See also *United Gas Improvement Co. v. Callery Properties*, 382 U.S. 223, 228 (1965); *FPC v. Hunt*, 376 U.S. 515, 524 (1964); *City of Chicago v. FPC*, 128 U.S. App. D.C. 107, 122, 385 F.2d 629, 644 (1967), *cert. denied* 390 U.S. 945 (1968). Moreover, the accounting and refund approach will in no way fully protect NAMBO's members themselves, let alone the public they serve. If the Commission should ultimately require a refund of the entire increase, these motor bus operators would get back only a small portion of their actual losses. Greyhound estimates that as a result of changes to its system necessitated by the increases, it could get back only \$6,000 to \$7,000 of the \$15,000 to \$17,000 monthly telegraph

cost increase caused by the new rates.¹⁵ In other words, in this area of Greyhound's communications service, *the refund procedure would fall short by over \$100,000 per year in making Greyhound whole.* Refunds to other NAMBO members would also fall far short of their actual losses. Moreover, this does not take into account the indirect cost to Greyhound's over-all operations of disruptions and impairments in its communications program as a result of the rate increase.¹⁶

It should also be noted that questions have been raised by the carriers as to the propriety of granting interest on refunds of unlawfully-collected TELPAK rates (J.A. 624, 640-41). This danger, standing alone, renders accounting inadequate to protect user groups.

A.T.&T. itself has recognized that accounting is not an adequate remedy, asserting that it does not cover the cost impact imposed upon users who find it necessary because of the rate increases "to revise their requirements and undertake extensive reconfigurations of their systems." (J.A. 708).

The Commission also recognized the inadequacies of accounting but suggested a complaint for damages as an additional remedy:¹⁷

"The very nature of identification of channels that are at this date affected by the change in equivalency ratios, and channels added in the future that may be affected thereby, contain sufficient questions of fact that an accounting order is not well suited to such

¹⁵ See NAMBO's Motion for Stay Pending Review, filed herein on January 9, 1970 (p. 9).

¹⁶ As pointed out in NAMBO's Motion for Stay Pending Review (p. 8), the effect of the increase on Greyhound will be (1) a curtailment of existing communications usage with resulting adverse impact on Greyhound's communications network, and (2) the cancellation of 18 planned new communications locations and a number of new circuits, and substantial contraction of other expansion plans.

¹⁷ FCC 70-75, 21 F.C.C. 2d 1, 6 (1970) (J.A. 730).

changes. Rather, a complaint requesting damages filed by each party affected by the equivalency ratio would seem to be the most efficient way of handling the problem."

However, a complaint for damages presents many problems in terms of both availability and adequacy. It could well be held precluded by or mutually inconsistent with an accounting under Section 204 of the Act. A one-year statute of limitations is imposed on complaints for damages. 47 U.S.C. § 415. The burden of proof in justifying rate increases is on the carrier, but in a complaint for damages the burden is shifted to the complaining user. Further, the complaining user would still never be able fully to recover for losses in efficiency through contraction of communications usage and expansion plans or for costs and service disruption suffered in restructuring communications systems to adapt them to a new rate structure. Moreover, the complaint procedure would obviously not afford an adequate remedy to the public to whom the TELPAK users provide service.

Manifestly, the Commission has not corrected the deficiencies in the protection afforded by its accounting order by simply pointing out the availability of a complaint for damages.

V. This Court Has the Power To Review and Remedy the Arbitrary and Capricious Refusal of the Commission To Prevent the Pyramiding of TELPAK Rate Increases Prior to Hearing

A. The Commission's Power and Responsibility

There can be no question that the Commission has the power and the duty to take the action which petitioner and others are here asking the Court to compel it to take.

Federal agencies clearly have the power and the duty to prevent the filing of rate increases contrary to agency policy or the pyramiding of rate increases which would unjustifiably injure the consuming public. Thus in *F.P.C. v.*

Texaco, 377 U.S. 33 (1964), the Supreme Court upheld an FPC policy which outlawed indefinite price change provisions in gas producer contracts and *provided that rate increases based on such provisions would be rejected*. The Court cited with approval the Commission's rationale that it was protecting the public "against waves of increases which have no defensible basis" (*id.* at 43) and held:

"Natural gas companies that seek to enter the field with prearranged escalator clauses and the like have a built-in device for ready manipulation of rates upward. Protection of the consumer interests against that device may be best achieved if it is given at the very threshold of the enterprise. At least the Commission may so conclude * * *."

In the *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), the Supreme Court upheld the authority of the FPC after completion of an area rate proceeding to impose a 2½ year moratorium on rate increase filings by gas producers. The Court stated (*id.* at 779):

"Certain of the producers urge that §§ 4 and 5 must in combination be understood to preclude moratoria upon filings under § 4(d). They * * * reason that § 4(d) creates an unrestricted right to file rate changes, and that such changes may, under § 4(e), be suspended for a period no longer than five months. If this construction were accepted, it would follow that area proceedings would terminate in rate limitations that could be disregarded by producers five months after their promulgation. The result, as the Commission observed, would be that 'the conclusion of one area proceeding would only signal the beginning of the next, and just and reasonable rates for consumers would always be one area proceeding away.' 34 F.P.C., at 228."

In *United Gas v. Callery Properties*, 382 U.S. 223 (1965), it was held that the FPC can prohibit the filing of increased producer rates above a specified level until determination of rates for all producers in the area in an over-all rate investigation. Even the separate opinion which concurred

in part and dissented in part recognized that the regulated companies had no "invincible right to raise prices subject only to a six-month delay and refund liability." (*Id.* at 232.)

In the *Ingot Molds Case*, the Supreme Court upheld the power of the Interstate Commerce Commission to hold the line on existing rates while it was making "a broad-scale examination of the whole question of the cost standards to be used", in reliance upon the principle of the *Permian Basin* case that "the legislative discretion implied in the rate making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself." *American Commercial Lines, Inc. v. Louisville & N. R.R. Co.*, 392 U.S. 571, 590, 592 (1968).

The foregoing cases are all the authority needed for the rejection action which the Commission should have taken. Clearly A.T.&T.'s instant filing violates prior Commission policies and determinations. It is in opposition to the 7% to 7½% rate of return finding and the determination that over-all A.T.&T. interstate rates are excessive made in Phase I-A of Docket 16258. It is contrary to the implicit moratorium on further TELPAK rate increases *prior* to hearing established by the Commission in permitting the first TELPAK rate increase to become effective. It is contrary to the Commission's continuous assurances that user groups would get an adequate opportunity to litigate the compensatory nature of the original TELPAK rates, an opportunity surely denied them if such rates are buried under pyramided increases. It is also contrary to the terms of the settlement of Phase I-B of Docket 16258 which was accepted by the Commission as a basis for terminating that phase.¹⁸ Such violations of agency policies and determina-

¹⁸ The Statement of Rate-Making Principles and Factors agreed to by the parties and accepted by the Commission in Phase I-B of Docket No. 16258 provided for participation by interested persons in the formulation of cost study methodology such as that used by A.T. & T. in the instant filing. FCC

tions are clearly comparable in nature to the situations in *Texaco*, *Permian Basin*, *Callery* and *Ingot Molds* which led the agency involved to take the kind of preventive action which the Federal Communications Commission here refused to take.

The power of the Commission to grant the relief requested by petitioner and others is also found in Section 203(b) of the Communications Act which authorizes the Commission "in its discretion and for good cause shown" to modify the thirty-day notice requirement in regard to the filing of rate changes and thereby effect a modification—either a decrease or an increase—in the total period including suspension which must elapse before the rate change becomes effective. Manifestly the Commission had ample "good cause" here materially to extend the thirty-day notice period to prevent frustration of its regulatory processes and irreparable damage to the consuming public.¹⁹

Even the Commission is beginning slowly to comprehend the scope of its power in this area. In its Memorandum

69-842, 18 F.C.C. 2d 761 (1969). Neither NAMBO nor any other party to Docket No. 16258 had any opportunity for *meaningful* participation in the development of the costing methodology employed by A.T.&T. Further the settlement agreement specified that this participation was to continue through to final development of the methodology and completion of the costing studies. Thus paragraph three of the procedures for implementing the agreed-upon principles provided: "No carrier initiated rate level increases *will be filed* until the new cost studies described in paragraph (2) have been completed and *made available to the parties hereto.*" (Emphasis supplied.) *NAMBO was never served with such new cost studies.* It is also NAMBO's understanding that no party received such cost studies sufficiently in advance of the rate filing to permit their proper review and evaluation. The A.T.&T. rate filing here involved is thus in direct violation of this Commission-accepted settlement agreement.

¹⁹ Additional authority to grant the kind of relief requested by petitioner and others is found in Section 4(i) of the Communications Act, 47 U.S.C. § 154(i), which gives the Commission power "to perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions", and in Section 4(j) of the Act, 47 U.S.C. § 154(j), which authorizes the Commission "to conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice".

Opinion and Order released November 6, 1969, which is under review in this proceeding, the Commission stated that "we are not deciding at this time the extent of our authority to grant the kind of relief petitioners request." (J.A. 562). Further, in a proceeding involving the lawfulness of Western Union tariffs, the Commission recently broadened its view of its power to protect its own proceedings. After the carrier filed a series of rate increases following the commencement of the hearing, the Commission issued an order forbidding Western Union from filing any further rate changes during the pendency of the proceeding except upon special permission from the Commission upon good cause shown. FCC 69-1307 (1969).

Clearly, in view of the *Texaco*, *Permian Basin*, *Callery* and *Ingot Molds* cases and the broad range of the Commission's authority and duty under express provisions of the Communications Act, the Commission's authority to reject further rate increases, under the extraordinary circumstances here involved, is well established. The Commission demonstrated its willingness to use such authority in the Western Union case and its failure to use it in the far more extreme situation here involved is clearly arbitrary and capricious, requiring remedial action by this Court.

B. This Court's Jurisdiction

This case does not involve a request that this Court substitute its own judgment for that of the Commission on whether or not to suspend a rate filing. Petitioner and others requested the Commission to reject the TELPAK rate filing on the grounds, *inter alia*, that it was violative of prior Commission policies and determinations and that failure to reject would constitute a prejudgment of the Docket 18128 rate proceeding. This is a far cry from requesting suspension or from asking this Court to review Commission suspension action. Accordingly, *Arrow Transportation Co. v. Southern R. Co.*, 372 U.S. 658 (1963), which

declined to interfere with an agency's exercise of its suspension power, is not applicable to this proceeding.

The refusal of the Commission to reject the TELPAK rate increase is clearly a final order subject to immediate judicial review in this Court. The federal courts have consistently reviewed agency orders rejecting or refusing to reject tariff filings. See, *e.g.*, *United Gas Co. v. Mobile Gas Corp.*, 350 U.S. 332 (1956); *United Gas Co. v. Memphis Gas Div.*, 358 U.S. 103 (1958); *Tyler Gas Service Company v. F.P.C.*, 101 U.S. App. D.C. 184, 247 F.2d 590 (1957), *cert. denied* 355 U.S. 895 (1957); *American Airlines, Inc. v. Civil Aeronautics Board*, 123 U.S. App. D.C. 310, 359 F.2d 624 (1966), *cert. denied* 385 U.S. 843 (1966); *Superior Oil Company v. Federal Power Commission*, 322 F.2d 601 (9th Cir. 1963), *cert. denied* 377 U.S. 922 (1964); *Continental Oil Company v. F.P.C.*, 378 F.2d 510 (5th Cir. 1967); *Flying Tiger Line v. Civil Aeronautics Board*, 92 U.S. App. D.C. 260, 204 F.2d 404 (1953); *W. J. Dillner Transfer Company v. United States*, 214 F. Supp. 941 (W.D. Pa. 1963).

The test of reviewability as applied to this proceeding was well stated by this Court in *Isbrandtsen Co. v. United States*, 93 U.S. App. D.C. 293, 297-98, 211 F.2d 51, 55-56 (1954), *cert. denied* 347 U.S. 990 (1954):

"This court has jurisdiction to review only final orders of the Board. Whether or not the statutory requirements of finality are satisfied in any given case depends not upon the label affixed to its action by the administrative agency but rather upon a realistic appraisal of the consequences of such action. 'The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control.' * * * Under this test, a final order need not necessarily be the very last order."

If petitioner and others are correct in thier contentions that permitting the TELPAK rate increase to become effective violated prior Commission determinations and policies, prejudiced the right of user groups to a full and fair hearing and constituted a prejudgment of the ultimate decision in the Docket 18128 proceeding—and such contentions are most assuredly correct—then clearly petitioner and other protesting parties had a *right* to have such rate filing rejected by the Commission. The denial of that right by the Commission, with all the damaging consequences resulting therefrom, clearly constitutes reviewable agency action under the *Isbrandtson* test.

CONCLUSION

For the reasons stated, the National Association of Motor Bus Owners respectfully requests this Honorable Court to reverse the actions of the Commission under review and remand the cause to the Commission for further proceedings in order that the Commission may reject the TELPAK rate filing here involved.

Respectfully submitted,


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APPENDIX A

Statutes and Rules Involved

COMMUNICATIONS ACT OF 1934, 48 Stat. 1064 et seq., 47 U.S.C. § 151 et seq.:

SECTION 4(i), (j), 47 U.S.C. § 154 (i), (j)

(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

* * * * *

(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. * * *

SECTION 203(b), 47 U.S.C. § 203(b)

(b) No change shall be made in the charges, classification, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions.

SECTION 204, 47 U.S.C. § 204:

Whenever there is filed with Commission any new charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, but not for a longer period than three months beyond the time when it would otherwise go into effect; and after full

If petitioner and others are correct in thier contentions that permitting the TELPAK rate increase to become effective violated prior Commission determinations and policies, prejudiced the right of user groups to a full and fair hearing and constituted a prejudgment of the ultimate decision in the Docket 18128 proceeding—and such contentions are most assuredly correct—then clearly petitioner and other protesting parties had a *right* to have such rate filing rejected by the Commission. The denial of that right by the Commission, with all the damaging consequences resulting therefrom, clearly constitutes reviewable agency action under the *Isbrandtson* test.

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hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed change of charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased charges as by its decision shall be found not justified. At any hearing involving a charge increased, or sought to be increased, after the organization of the Commission, the burden of proof to show that the increased charge, or proposed increased charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

SECTION 206, 47 U.S.C. § 206:

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

SECTION 207, 47 U.S.C. § 207:

Any person claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter pro-

vided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

SECTION 415(b), (c), (d), 47 U.S.C. § 405(b), (c), (d):

(b) All complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within one year from the time the cause of action accrues, and not after, subject to subsection (d) of this section.

(c) For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers within one year from the time the cause of action accrues, and not after, subject to subsection (d) of this section, except that if claim for the overcharge has been presented in writing to the carrier within the one-year period of limitation said period shall be extended to include one year from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

(d) If on or before expiration of the period of limitation in subsection (b) or (c) a carrier begins action under subsection (a) for recovery of lawful charges in respect of the same service, or, without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include ninety days from the time such action is begun or such charges are collected by the carrier.

ADMINISTRATIVE PROCEDURE ACT OF 1946, 60 Stat. 237, et seq., as revised, 80 Stat. 381, et seq., 5 U.S.C. § 551 et seq.:

SECTION 2, 5 U.S.C. § 551:

For the purpose of this subchapter—

* * *

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

SECTION 10(a), 5 U.S.C. § 702:

(a) A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

SECTION 10(c), 5 U.S.C. § 706:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

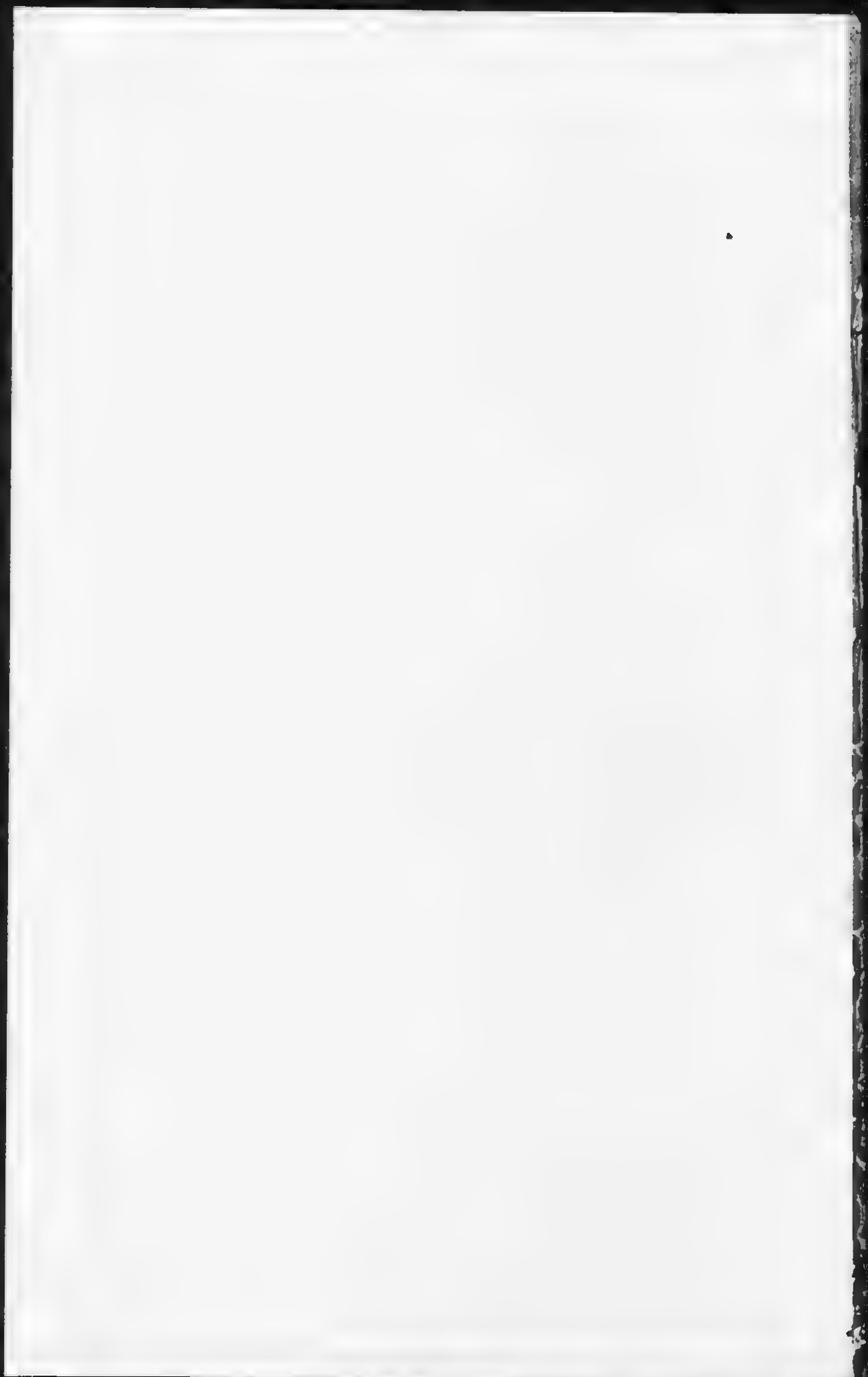
RULES AND REGULATIONS OF THE FEDERAL COMMUNICATIONS
COMMISSION:

SECTION 1.723, 47 C.F.R. § 1.723:

(a) In case recovery of damages is sought, the complaint shall contain appropriate allegations showing such data as will serve to identify, with reasonable certainty, the communications, transmissions, or other services for which recovery is sought, and shall state:

- (1) That the complainant makes claim for damages;
- (2) The name and address of each individual claimant asking damages;
- (3) The name and address of the defendant against which the claim is made;
- (4) The communications, transmissions, or other services rendered, the charge applied thereto, the date when charges were paid, by whom paid, and by whom borne;
- (5) The period of time within which, or the specific dates when the communications, transmissions, or other services were rendered;
- (6) The points of origin and reception of the communications or transmissions, and if the damages sought to be recovered are for services other than communications or transmissions, then the allegations of the complaint shall state the nature and extent of such services, the date or dates when rendered, when paid for, and by whom borne;
- (7) The nature and amount of injury sustained by each claimant;
- (8) Separately, the damages with respect to each communication, transmission, or other service for which recovery is sought;
- (9) If damages are sought on behalf of others than the complainant, in what capacity or by what authority complaint is made in their behalf; and
- (10) That suit has not been filed in any court on the basis of the same cause of action.

(b) Damages will not be awarded upon a complaint unless specifically requested. Damages may be awarded, however, upon a supplemental complaint based upon the finding of the Commission in the original proceeding.



BRIEF FOR PETITIONER
THE ASSOCIATED PRESS

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,833

(Consolidated with Nos. 23,836, 23,839, 23,841, 23,842 and 23,843)

THE ASSOCIATED PRESS, *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, *Respondents,*
AMERICAN TELEPHONE AND TELEGRAPH COMPANY and THE
WESTERN UNION TELEGRAPH COMPANY, *Intervenors.*

On Petition for Review of an Order of the
Federal Communications Commission

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 29 1970

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No. 23,833

(Consolidated with Nos. 23,836, 23,839,
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AMERICAN TELEPHONE AND TELEGRAPH COMPANY and THE
WESTERN UNION TELEGRAPH COMPANY, *Intervenors.*

On Petition for Review of an Order of the
Federal Communications Commission

**BRIEF FOR PETITIONER
THE ASSOCIATED PRESS**

ISSUES PRESENTED*

1. Whether the Federal Communications Commission erred in failing to reject TELPAK rate increases which reduced the number of telegraph channels equivalent in TELPAK pricing to a voice channel from six to two,

* The case has not previously been before the Court except on applications for relief pending review.

when AT&T failed in the rate filing to comply with the requirement of the Communications Act and the Commission's Rules that a carrier submit *prima facie* justification for all rate increases and also failed to comply with certain Commission requirements as to the form the filing must take.

2. Whether the Federal Communications Commission denied The Associated Press ("AP") its right to a hearing or its right to a statement of reasons for refusing to act on AP's objections to the form and content of the TELPAK equivalency change by failing to consider, discuss, or even mention any aspect of AP's objections.

REFERENCES TO RULINGS

Petitioner is seeking review of the Federal Communications Commission's Memorandum Opinion and Order released November 6, 1969, 34 Fed. Reg. 18142, 20 F.C.C.2d 383, reprinted in the Appendix at page 588. The Commission denied requests for reconsideration by Memorandum Opinion and Order released January 19, 1970, 21 F.C.C. 2d 1, reprinted in the Appendix at page 724.

STATUTES AND RULES INVOLVED

Pertinent provisions of the Communications Act of 1934, the Administrative Procedure Act, and the Rules of the Commission are set forth in the Addendum to this Brief.

STATEMENT OF THE CASE

Nature of the Case

This case comes before this Court on Petitions to Review an Order of the Federal Communications Commission refusing various customer requests that the Commission reject, as violating the Commission's Rules, the Communications Act, and accepted principles of ratemaking, substantial rate increases filed by Intervenor American Telephone and Telegraph Company for its bulk private line

offerings known as TELPAK.¹ The Commission, in its decision, however, never truly addressed itself to the issue raised in this case but instead suspended the tariff for the statutory period of three months²—utterly failing to distinguish its power to *suspend* and investigate questionable rate increases from its power to *reject* voidable tariff submissions. The consistent position of AP has been and remains that the October 1, 1969, rate increases are voidable and should have been rejected by the Commission (see App. 361).³

The TELPAK tariff has three separate components—line haul or the monthly charge per mile for a TELPAK section; terminals or the monthly charge for terminating a data, voice, telephotograph, or telegraph channel (each channel in use requires at least two terminals); and equivalency or the number of telegraph channels which may be used for the same line haul (but not terminal) charge as one voice channel. Because of the importance of telegraph-grade service to news dissemination by AP, AP before the Commission and before this Court challenges as voidable only 7th Revised Page 81 of AT&T Tariff F.C.C. No. 260 which contains the reduction in equivalency from 6 to 1 to 2 to 1—in effect a three-fold increase in charges for telegraph line haul service ordered under TELPAK.⁴ AT&T has not offered any plausible justification for this rate increase, which it concedes is contrary to technology, as required by Section 204 of the Communications Act (47

¹ Case No. 23,833 (AP) has been consolidated with Case Nos. 23,836, 23,839, 23,841, 23,842, and 23,843, but differs from them in that AP is here only contesting the refusal of the Commission to reject the change in equivalency aspect of the TELPAK rate increases.

² See Communications Act of 1934, § 204, 47 U.S.C. § 204 (1964).

³ Citations to the Appendix are abbreviated “App.”

⁴ AP in limiting its challenge to the validity of the change in equivalency does not acquiesce in or concede the validity of the massive increases in line haul and terminal charges. AP has focused on this single aspect of the rate increases because of the importance of telegraph-grade service to news dissemination and the complete lack of any possible cost or technical justification for the change.

U.S.C. § 204 (1964)) and Section 61.33(a) of the Commission's Rules (47 C.F.R. § 61.33(a) (1970)).⁵

As we shall show, these defects render AT&T's tariff revision voidable and subject to summary rejection. Moreover, the failure of the Commission to consider the issues raised by AP and others with regard to the change in equivalency completely vitiates the decision below.

Proceedings Below

In January 1961, AT&T filed a new bulk communications offering known as TELPAK, and that service offering has been subject to scrutiny and litigation before the Commission for the last nine years. The first investigation of TELPAK was culminated by the Commission's Memorandum Opinion and Order adopted December 23, 1964, finding that the evidence adduced at the hearing established that the rate levels for the two largest TELPAK offerings (TELPAK C and D) were "justified by competitive necessity" but that the rate levels for the smaller offerings (TELPAK A and B) were too low. *TELPAK*, 37 F.C.C. 1111, 1117 (1964). The Commission, however, ordered further hearings as to the compensativeness of TELPAK C and D. *Id.* at 1118. This still has not been determined. See *General Rate Investigation*, 18 F.C.C. 2d 761 (1969) (App. 214).

On October 1, 1969, before it had been called upon to justify its first round rate increases and before a single hearing had been held in the Commission's investigation of those rate increases, AT&T by its Transmittal No. 10609 again filed massive second round rate increases which were virtually the same as those it had voluntarily withdrawn under fire eighteen months earlier, including a further limitation on the telegraph to voice equivalency from 6 to 1 to 2 to 1 (App. 272).

⁵As if to avoid this requirement, AT&T deceptively labels the increase a "change" rather than an "increase" in violation of Section 61.55(e) of the Commission's Rules (47 C.F.R. § 61.55(e) (1970)).

On October 9, 1969, AP filed a petition specifically requesting the Commission to reject 7th Revised Page 81, which would reduce the number of telegraph channels which could be leased at the price of a voice grade channel from 6 to 2, on the grounds that this submission was not in compliance with Section 204 of the Communications Act or with tariff regulations of the Commission (47 C.F.R. §§ 61.33(a) and 61.55(e) (1970)) (App. 361). AP pointed out that the change in equivalency alone would have a serious impact on its news dissemination activity by causing an "overflow" in its New York City to Washington, D. C., TELPAK C service, the only TELPAK service which AP could economically afford to retain. This "overflow" would cause irreparable harm to AP by requiring rearrangement in AP's communications service such as the cancellation of high-speed facsimile between Washington and New York and the purchase of channel deriving equipment to enable AP to derive telegraph service from voice-grade channels. Other users attacked the entire tariff filing on a variety of grounds.

AT&T opposed the requests, asserting that "the Commission does not have the power to reject, or compel withdrawal of, the tariff changes in question" (App. 535).

The Commission, by Memorandum Opinion and Order released November 6, 1969, 20 F.C.C.2d 383, refused all relief sought by the users except for the imposition of a three-month suspension and an order of accounting (App. 588). Thus, the second round of rate increases became effective February 1, 1970. The Commission's opinion, however, never treats the patent violations of the Commission's own rules involved in the change in equivalency.⁶

⁶ The importance of strict compliance with the Commission's tariff rules was underscored the week after AP filed its petition to reject by the Commission's Notice of Proposed Rule Making in Docket 18703, observing that "[i]t has become apparent that many carriers are providing only the minimum amount of information necessary to comply *pro forma* with [Section 61.33(a) of the Rules]," and proposing more detailed requirements, not designed to reform the rules, but merely to "restate the original intent" of them. 34 Fed. Reg. 17116 (1969) (App. 489, 490).

Some of the parties below, but not AP, petitioned the Commission for reconsideration of this decision, but its Memorandum Opinion and Order of January 19, 1970, 21 F.C.C.2d 1 (App. 724), the Commission denied all requests for reconsideration. Although in the November 6 Memorandum Opinion and Order, the Commission had brushed aside all claims that an accounting order might be inadequate with the conclusionary statement that "the accounting procedures should be sufficiently accurate to insure all customers are recompensed" (20 F.C.C.2d at 387, App. 563), the Commission on reconsideration realized its folly and admitted that "[t]he very nature of identification of channels that are at this date affected by the change in equivalency ratios, and channels added in the future that may be affected thereby, contains sufficient questions of fact that an accounting order is not well suited to such changes" (21 F.C.C.2d at 6, App. 730). Aside from this concession, the Commission on reconsideration still failed to perceive any significant distinction between the change in equivalency and the other aspects of the rate increases.

AP filed its Petition for Review in this Court on January 2, 1970, and Motion for Injunction Pending Review on January 7, 1970. The Motion for Injunction Pending Review was denied by this Court on January 29, 1970.

Statement of Facts

Petitioner The Associated Press is engaged in dissemination of news over private line services leased from Intervenor AT&T. As shown in the Affidavit of Daniel DeLuce in Support of AP's Motion for Injunction Pending Review filed in this Court of January 7, 1970, under the original TELPAK offering, AP leased 10,160 section miles of the now-discontinued TELPAK A and B. When AT&T cancelled TELPAK A and B, effective August 1, 1967, AP cut back its TELPAK service to 5,623 section miles of TELPAK C. By the end of 1967, AP had made further rearrangements in its communications and reduced its

TELPAC service to 3,870 section miles. On September 1, 1968, TELPAK terminal charges were increased by 66.7 percent from \$15 to \$25, and line haul charges for TELPAK C were increased 12 percent from \$25 to \$28. More important to AP, however, the telegraph to voice equivalency was lowered from 12 to 1 to 6 to 1. As a result, AP further cut back its TELPAK service to 2,800 section miles.

In the following months, further rearrangements were made in AP's communications, and by February 1, 1969, AP retained only 444 section miles connecting Boston and Washington, with drops at intermediate cities. However, as a result of the February 1, 1970, rate increases, raising terminal charges another 40 percent to \$35 per terminal and the line haul another 7 percent to \$30 per mile, AP has been forced to terminate the 223 miles of this remaining TELPAK C service between Boston and New York City. This has required the termination of certain services which were economically justified using the excess TELPAK capacity, but which would be uneconomic under the single channel rates.

Moreover, as a result of further limiting the telegraph to voice equivalency to 2 to 1, AP has been forced in its remaining New York to Washington TELPAK section to cancel the high-speed facsimile service which was used at the speed at which news of international importance originating in Washington can be transmitted to AP's New York office. Using high-speed facsimile, typed pages of stories were transmitted at approximately three times the speed at which they can now be transmitted using conventional telegraph equipment. AP has also been forced to replace some of the telegraph channels it had been obtaining under TELPAK from AT&T by multiplexing such channels from a voice channel.

To understand the nature of the equivalency change, one must fully comprehend the nature of TELPAK service.

AT&T has stated that TELPAK is its response to the Commission's policies on licensing of private microwave systems and its response to the needs of large bulk users of communications.⁷ Under TELPAK, AT&T leases to users a fixed carrier spectrum in much the same way as one would receive service from one's own private microwave system. Like a private microwave system, the line haul costs are the same whether or not any of the capacity is actually used. Also like a private microwave system, there is additional cost for terminal arrangements for each channel actually in use.

According to AT&T's private line tariff (AT&T Tariff F.C.C. No. 260):

"[TELPAC service] provides Base Capacity for transmitting various forms of electrical communication up to the limits specified in various types as set forth in (1) following, and Terminating Arrangements necessary for the utilization of such capacity as set forth in (2) following.

"Within the limits of a Base Capacity, the customer may order as many wideband and/or individual channels of lesser capacity arranged for use as he requires" AT&T Tariff F.C.C. No. 260, 3rd Revised Page 79.

The tariff goes on to explain that:

"Base Capacity denotes the potential for communication channels and services which can be realized only with the use of service terminals furnished under (2) following. Base Capacity, with the appropriate Terminating Arrangements, is provided for the use as a wideband channel or for use as wideband channels and/or individual channels of lesser capacity which in total do not exceed the equivalent voice grade capacity specified for each type

"For each Base Capacity the Telephone Company undertakes to provide at the charges determined under

⁷ See TELPAK, 37 F.C.C. 1111, 1113-14 (1964).

(C) following only that portion of the maximum Base Capacity which the customer orders as channels arranged for his use; additional channels up to the maximum of the Base Capacity will be provided and arranged for use at the customer's request, subject to the availability of suitable service terminals or connecting arrangements." *Id.*

Base Capacity then is defined in terms of "maximum equivalent carrier spectrum", and AT&T provides this service in either 240 kHz (TELEPAK C) or 1,000 kHz (TELEPAK D). *Id.*

However, contrary to the express terms of the tariff quoted above, AT&T has never permitted a customer using *telegraph* service, as opposed to voice grade or broad band services, to utilize the full benefit of the carrier spectrum reputedly leased to him. As shown in Mr. DeLuce's Affidavit, it is feasible to derive as many as 22 telegraph channels from a single voice facility, and AT&T's standard practice is to derive between 16 and 18 voice-grade channels. Thus, in an offering such as TELEPAK, which sells *carrier spectrum*, rather than specific services, anything less than the actual amount of service which is derived from the facilities reputedly to be sold is immediately open to question.

The original TELEPAK offering filed in 1961 and in effect to September 1, 1968, permitted as many as 12 telegraph channels to be obtained for one voice channel. Thus, under the original tariff, for the price of a TELEPAK C section, a customer was permitted to use as many as 720 telegraph channels (but the carrier spectrum which he was leasing would accommodate 1,080 telegraph channels). The first round of rate increases arbitrarily limited this equivalency to 6 to 1, limiting the maximum capacity which the Telephone Company would sell as telegraph to 360 telegraph channels—only one-third of the spectrum leased. The second round of rate increases further limits TELEPAK C to only 120 telegraph channels. Thus, although the AT&T

asserts in its tariff that it is leasing a carrier spectrum of 240 kHz for TELPAK C, in practice, AT&T has arbitrarily restricted telegraph users to a maximum carrier spectrum of only 26.7 kHz. The excess 213.3 kHz can be and is resold by AT&T.

In AT&T's October 1 tariff change, this effective threefold increase in the charges for telegraph service (on top of the first round twofold increase to 6 to 1 which is still under investigation) in TELPAK appears in the following innocuous tariff provision:

"Two such channels, or any portion thereof, or (C) a combination, not exceeding two, of such channels, between the same pair of service points have the equivalent of one voice grade channel." AT&T Tariff F.C.C. No. 260, 7th Revised Page 81 (App. — (C) 276).

Reference to the letter of transmittal reveals that the only statement with respect to this revision is the following: "The Tariff provisions provide for . . . (b) a change from 6 (3 in the case of 150 band service) to 2 in the number of telegraph channels having the equivalent of one voice grade channel . . ." (App. 272).

This, however, is not a result of a technological change. AT&T concedes that "considerably more than two telegraph channels can physically be derived from a voice channel (App. 288). All that appears in the material submitted by AT&T is the conclusionary statement that "[t]he overall relationship between the costs of telephone and telegraph (69-75 speed) type channels (including both terminal and line costs) is slightly under 2 to 1" (App. 288). This statement, however, is controverted on its face. If AT&T desires to bring the revenue relationship between telephone and telegraph channels to "slightly under 2 to 1" the proper line haul equivalency is *12 to 1*—the original equivalency—as long as the relationship of TELPAK terminal charges for telephone and telegraph remains 1 to 1. A line

haul equivalency of 2 to 1 appears to result in an overall revenue relationship of about to 1.5 to 1—a significant burden on telegraph-grade service.

In its October 9, 1969, Petition for Rejection, Ap specifically raised its claim that AT&T Transmittal No. 10609 was fatally deficient in failing to comply with Section 204 of the Communications Act or with Section 61.33(a) and 61.55(e) of the Commission's own rules (App. 361, 362-63, 367-69).

(N.)

The Commission in its November 6 Memorandum Opinion and Order makes no reference to the issues raised by AP with respect to the deficiencies of Transmittal No. 10609. The Commission deals only with the allegations:

“(1) that the instant rate increases violate the statement of ratemaking principles and factors in docket No. 16258, phase I-B, (2) that the tariff increases are patently improper and involved, and that (3) suspension and investigation of these tariffs, together with an accounting order, are inadequate remedies and that extraordinary relief is necessary.” 20 F.C.C.2d at 385 (App. 561).

All that the Commission decided, however, was that “[w]e have previously responded to petitioners’ contention that we possess plenary power pursuant to sections 4(i) and 303(r) of the Communications Act of 1934, as amended, to accord the requested relief, in our order adopted August 28, 1968, 14 F.C.C.2d 564, and find no reason to disturb our conclusion reached therein” (20 F.C.C.2d at 386, App. 562). This statement, however, refers only to the Commission’s denial of authority to suspend tariffs for more than three months after their scheduled effective date. It does not respond to the request of the parties that the tariff be *rejected*, a power which has been recognized by the Commission in recent actions, and in its Notice of Proposed Rule Making in Docket 18703.

ARGUMENT

I

THE CHANGE IN TELPAK TELEGRAPH TO VOICE EQUIVALENCY IS VOIDABLE BECAUSE IT VIOLATES THE COMMUNICATIONS ACT AND THE COMMISSION'S TARIFF REGULATIONS, AND THE COMMISSION ABUSED ITS DISCRETION IN FAILING TO REJECT THIS ASPECT OF THE RATE INCREASES

In the ordinary course, AT&T, as a communications common carrier regulated under Title II of the Communications Act of 1934,⁸ has the authority to initiate rate adjustments for interstate service by filing appropriate tariff materials with the Commission. This right, however, has never given it the "invincible right"⁹ to file papers with the Commission in any form it desires without complying with reasonable regulations made by the Commission pursuant to Section 4(i) and 303(r) of the Communications Act, 47 U.S.C. §§ 154(i), 303(r) (1964) (*see Press Wireless, Inc. v. FCC*, 105 U.S. App. D.C. 86, 264 F.2d 372 (1959)) or to file substantial rate increases without making a *prima facie* showing by market and cost analyses that the rate will be just and reasonable as required by Sections 201(b) and 204 of the Communications Act, 47 U.S.C. §§ 201(b), 204 (1964) (*see United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1961)), or to file for substantial rate increases during the pendency of a general rate investigation and when the carrier is already earning substantial amounts in excess of the maximum return found reasonable by the Commission in that rate investigation (*see Texas Eastern Transmission Corp.*, 18 F.P.C. 130 (1957)). Moreover, considering the substantial harm which will result to AP and other user parties from the equivalency change, which the Commission belatedly recognized "that an accounting order is not well suited" to recompense

⁸ 47 U.S.C. §§ 201-21 (1964).

⁹ *See United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 232 (1965) (separate opinion); *Permian Basin Area Rate Cases*, 390 U.S. 747, 779 (1968).

(*TELPAC-Private Line*, 21 F.C.C.2d 1, 6 (1970), App. 724, 730), the Commission abused its discretion in failing to require strict compliance by AT&T with these threshold statutory and regulatory requirements.

Congress, in adopting the suspension and accounting provisions of Section 204 of the Communications Act, 47 U.S.C. § 204 (1964), did not contemplate the extraordinary circumstances present in this case, the totality of which requires that the Commission exercise its discretion "to issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions" (47 U.S.C. § 154(i) (1964)), and reject the proposed equivalency change. Consumers would be wholly at the mercy of AT&T if it were permitted to file rate increases without any threshold showing of reasonableness. The only control on its rates is the Commission, and the Commission must adopt procedural safeguards to protect the public interest. Congress ordered the Commission to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. § 154(j) (1964). But the acceptance of defective rate increases on top of past rate increases during a nine-year-old rate proceeding will not "conduce to the proper dispatch of business", and in view of the irreparability of the harm which will result to AP and the excessive rate of return which AT&T is already earning, such acceptance cannot serve "the ends of justice."

A. The Commission Has Authority To Reject Tariffs Filed Which Violate the Communications Act or Which Violate the Commission's Rules and Regulations

The power of the Federal Communications Commission to reject improperly filed or otherwise deficient tariffs filed by communications common carriers subject to Title II of the Communications Act of 1934 is well settled. The Commission has long claimed this authority and has been upheld in the courts without serious opposition from AT&T.

The Commission's tariff rules provide that tariffs may be "rejected for cause" (47 C.F.R. § 61.36 (1970)).

The authority of the Commission to reject voidable tariffs is clearly encompassed within the agency's general powers to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i) (1964); *see also* 47 U.S.C. § 303(r) (1964). Obviously, if the Commission were denied this fundamental authority, it would have no practicable means of assuring that tariff filings would comply with certain basic formal and substantive requirements, and the result would be an administrative chaos. *See* 47 U.S.C. § 203(b) (1964).

Administrative construction of the Communications Act has uniformly affirmed the right of the Commission summarily to reject tariffs not filed in conformity with its rules, and the Commission has been upheld by this Court. For example, when the Commission has been upheld by this Court. For example, when the Commission summarily rejected tariffs filed by Press Wireless, Inc. (25 F.C.C. 1466 (1958)), the carrier appealed and the Commission's authority was affirmed *per curiam*. *Press Wireless, Inc. v. FCC*, 105 U.S. App. D.C. 86, 264 F.2d 372 (1959). Indeed, just this Fall, the Commission rejected AT&T's audio program tariffs for procedural defects, including inadequate justification, and AT&T did not challenge the Commission's authority. *See* FCC News Release, September 17, 1969 (FCC mimeo 37780).

The power of other regulatory agencies to reject tariffs which are unlawful on their face has been upheld by the Supreme Court. Under the Natural Gas Act the statutory scheme for regulating natural gas analogous to that contained in Title II of the Communications Act, it was held that "[t]here can be no doubt of the authority of the [Federal Power] Commission to reject the unauthorized filing under its general powers to issue orders neces-

sary or appropriate to carry out the provisions of this Act,' § 16 [15 U.S.C. § 717o (1964)]." *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 347 (1956). The FPC was not required to hold hearings to determine whether the new rates violated the existing contracts, but was *required* summarily to reject the rates. Similarly, the FCC must summarily reject tariffs when they violate the Communications Act, Commission's tariff rules, and the Commission's order restricting the carrier's rate of return.

Thus, the Supreme Court has held that Section 4 of the Natural Gas Act, 15 U.S.C. § 717f (1964), does not "bestow on producers an invincible right to raise prices subject only to a six-month delay and refund liability." *Permian Basin Area Rate Cases*, 390 U.S. 747, 799 (1968); *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 232 (1965) (separate opinion). Indeed, the Supreme Court has even upheld the power of the ICC, which, unlike the FCC and FPC, has no general grant of authority "to issue orders . . . as may be necesary in the execution of its functions" and "to the ends of justice,"¹⁰ to limit the right of carriers to file rate changes by declaring a moratorium pending a general rate investigation. *See American Commercial Lines, Inc. v. Louisville & N.R.R.*, 392 U.S. 571 (1968). But, if this Court accepts AT&T's argument advanced before the Commission that the Commission cannot under any circumstances reject rate increases, AT&T would be granted an "invincible right" to file rate increases subject only to a *three-month* delay. Such a result would be contrary to law and equity, and lead to a perpetuation of unlawful charges which would be borne by the public at large.

AT&T's reliance below and before this Court on Petitioner's application for temporary relief on cases such as

¹⁰ Compare Interstate Commerce Act, §§ 11-12, 49 U.S.C. §§ 11-12 (1965), with Communications Act, §§ 4(i), (j), 303(r), 47 U.S.C. §§ 154(i), (j), 303(r) (1964).

Willmut Gas & Oil Co. v. FPC, 111 U.S. App. D.C. 49, 294 F.2d 245 (1961), and *North Carolina Natural Gas Corp. v. United States*, 200 F. Supp. 745 (D. Del. 1961), is misplaced.¹¹ To the extent that these cases survive *Callery* and the *Permian Basin Area Rate Cases*—if, indeed, they survive at all¹²—they only stand for the proposition that the ICC and FPC cannot summarily reject before a hearing on the *substantive issue of reasonableness*. They do not preclude rejection for procedural defects as has been requested by AP in this case. The only claim raised by AP which could possibly relate to substantive matters is that the Commission acted arbitrarily in refusing to enforce the order entered after hearing in the *General Rate Investigation*, which restricts AT&T to a maximum rate of return of 7.5 percent (see *General Rate Investigation*, 9 F.C.C. 2d 31, 88, 115-16 (1967)).

Like the FCC other administrative agencies have found it necessary to prescribe rejection for tariffs which are filed in violation of the agency's rules, orders, or organic acts. For example, under ICC regulations:

"Any tariff or schedule tendered for filing, which fails to give lawful notice of changes in rates, charges or provisions which it proposes to establish, or which fails to meet the requirements of the regulations contained in this chapter, or violates any order of the Commission or of a court, is subject to rejection by the Commission." 49 C.F.R. § 1300.14(e)(1) (1970). See also 14 C.F.R. § 221.180 (1970) (CAB); 18 C.F.R. § 35.5 (1970) (FPC).

Against the history of judicial and administrative construction, AT&T cannot now be heard to assert that "the Com-

¹¹ See App. 539; Memorandum of AT&T in Opposition to Petitioners' Motions for a Stay, January 20, 1970, pp. 41-44, 58.

¹² *Willmut* is of questionable vitality today in light of recent Supreme Court decisions. For example, the FPC was upheld in *Callery* in its belief *Willmut* and similar cases were "judicial aberrations" 335 F.2d 1004, 1017 (5th Cir. 1964)). See also *FPC v. Texaco, Inc.*, 377 U.S. 33 (1964).

mission does not have the power to reject" the TELPAK equivalency change (App. 535), which, in the terms of the ICC's regulation, "fails to give lawful notice of changes in rates," "fails to meet the requirements of" the Commission's tariff rules, and which "violates . . . [an] order of the Commission" restricting AT&T's rate of return.

The Commission in its Order of November 6, 1969, denied its "authority to grant extraordinary remedies" (20 F.C.C. 2d at 386, App. 562), but this apparently did not reach the question of whether or not the tariffs should be rejected. Indeed, one of the great defects of the Commission's action is that it never truly addresses itself to AP's contention that the change in equivalency violated the Commission's own rules, and was therefore voidable. The Commission's total attention was directed towards the question whether it could suspend the rates for a period longer than the three months specified in Section 204 of the Act. *See id.* at 385-86.

B. The Change in Equivalency Was Voidable for Failure of AT&T To File With It Prima Facie Justification for the Change in Equivalency

Section 204 of the Communications Act provides, *inter alia*, that:

"At any hearing involving a charge increased, or sought to be increased after the organization of the Commission, the burden of proof to show that the increased charge, or proposed increased charge, is just and reasonable shall be upon the carrier" 47 U.S.C. § 204 (1964).

Because of this burden of proof, the Commission's tariff rules require rate increases to be clearly marked with the symbol "I" (47 C.F.R. § 61.55(e) (1970)) and further require the accompanying letter of transmittal to include

"a statement showing in detail the reasons for all changes in charges or regulations and in case any such

change results in increased charges, the facts upon which the carrier relies in justification thereof." (47 C.F.R. § 61.33(a) (1970)).

In default of these and other requirements in Part 61 of the Rules, the Commission will reject the filing as void as it has done recently with the audio program tariff. See News Release, September 17, 1969 (FCC mimeo 37780).

The provisions of the Communications Act and implementing Commission regulations give the carriers the right to initiate rates, but place upon the carriers the concomitant obligation of making a *prima facie* case for the increased rates. Without such a showing, a hearing would be a tremendous waste of administrative manpower, especially in view of the propensity of rate proceedings to extend over as many years as has the TELPAK cases.

AT&T in its Transmittal No. 10609 has not even attempted to make any showing in justification of the change in equivalency, let alone "facts in detail" as required by the Commission. Indeed, AT&T even mislabelled the increase as merely being a "change".¹³ There can be no doubt that the reduction in the telegraph channel capacity of a TELPAK C section from 360 channels to 120 channels is a rate increase—and a substantial one at that.

¹³ Section 61.55(e) of the Commission's tariff rules provides that:

"The following symbols shall be used in tariffs for the purposes indicated below and they shall not be used for any other purposes:

R to signify reduction.
I to signify increase.
C to signify changed regulation.
P to signify change in text but no change in rate or regulation.
S to signify reissued matter.
N to signify new rate or regulation.
D to signify discontinued rate or regulation."

47 C.F.R. § 61.55(e) (1970).

For failure of AT&T to comply with this formal requirement alone, the tariff should have been rejected, just as the Commission would reject for failure to use 8½ by 11 inch paper (47 C.F.R. § 61.52 (1970)), for failure to include the exact name of the issuing carrier (47 C.F.R. § 61.54(b) (1970)), or for any other of a number of formal requirements. See 47 C.F.R. § 61.36 (1970).

All that can be found that refers to the equivalency is in AT&T's explanation of the six test rates which were allegedly used in its market study:

"Schedule No. 3 also includes a telegraph to telephone channel equivalency ratio of 2 to 1. The overall relationship between the costs of telephone and telegraph 60-75 speed) type channels (including both terminal and line costs) is slightly under 2 to 1. While considerably more than two telegraph channels can physically be derived from a voice channel, this is offset by the fact that terminal costs for telegraph channels are considerably higher than those for telephone. It is the combined effect of these two phenomena that results in the overall cost relationship referred to above." App. 288.

However, AT&T submits no cost data to support these conclusionary statements and has clearly failed to meet the Commission's standards.¹⁴

Moreover, even assuming the relative *overall* costs of telegraph to voice service is "slightly under 2 to 1", that cannot possibly justify setting the line haul rates at 2 to 1 while leaving the terminal rates at 1 to 1. This can be illustrated by comparing two representative TELPAK C sections of 100 miles in length both with a pricing "fill" of 60 percent¹⁵ at the present line haul rate of \$30 per mile

¹⁴ Shortly after Transmittal No. 10609 was filed with the Commission, the Commission released a Notice of Proposed Rule Making to revise its tariff regulations because the "carriers are providing only the minimum amount of information necessary to comply *pro forma*" with Section 61.33(a) of the Rules (47 C.F.R. § 61.33(a) (1970)). 34 Fed. Reg. 17116 (1969) (App. 490). The proposed rules designed only to "restate the original intent" of the existing rules make clear that the Commission requires a *prima facie* justification for all rate increases since the proposed rules also would require that the material "be of such composition, scope, and format that it could serve as the carrier's complete case-in-chief" if a hearing is required. Proposed § 61.39, 34 Fed. Reg., 17117 (1969) (App. 494).

¹⁵ The Affidavit of Charles H. Miller submitted in this Court in support of the Memorandum of AT&T in Opposition to Petitioners' Motion for Stay on January 22, 1970, indicates that the average TELPAK C fill is 61.6 percent. See Affidavit, p. 5. As a practical matter, it would be unfair to AT&T to compare hypothetical sections with any greater fill since the greater the fill the more significant are the terminal charges in relation to the total charges. Moreover, users such as AP value "excess capacity" in TELPAK for future expansion.

and terminal rates of \$135 per terminal—one with all voice channels and the other with all telegraph channels. At the 2 to 1 equivalency, this would be 36 voice channels in the one and 72 telegraph channels in the others.

TELPAK C REVENUES

(60% fill; 2:1 Equivalency)

	<u>36 voice</u>	<u>72 telegraph</u>
Line haul	\$3,000	\$3,000
Terminals	2,520	5,040
Total	<u>\$5,520</u>	<u>\$8,040</u>
Revenue per channel	\$ 153	\$ 112

Under these conditions, the revenue per channel of telegraph service is 73 percent of the revenue per channel of voice service not the 50 percent AT&T has claimed would be correct.

By contrast, assuming the same rates and fills, but using an equivalency of 12 to 1—the original equivalency—the all-telegraph would contain 432 telegraph channels and produce the following revenues:

TELPAK C REVENUES

(60% fill; 12:1 Equivalency)

	<u>36 voice</u>	<u>432 telegraph</u>
Line haul	\$3,000	\$ 3,000
Terminals	2,520	30,240
Total	<u>\$5,520</u>	<u>\$33,240</u>
Revenue per channel	\$ 153	\$ 77

At the original 12 to 1 equivalency, each telegraph channel would produce slightly more than 50 percent of the revenues which would be produced by a voice channel, or, put

the other way, the revenue relationship is "slightly less than 2 to 1."

Thus, AT&T's only possible "justification" for the equivalency change is not only defective in scope and detail, its is demonstrably wrong on its face. AT&T has not, to anyone's knowledge, made any analysis of the cost/revenue relationship of voice and telegraph service now provided under TELPAK, yet such an analysis is absolutely necessary for AT&T to make out a *prima facie* case that the 2 to 1 equivalency is just and reasonable. Having failed to consider these effects prior to filing the increases, it is unfair in the interim to deprive AP of a service which has proven vital to its news dissemination activities.

Considered another way, the essence of the TELPAK tariff is the offering of a carrier transmission spectrum of 240 kHz for TELPAK C which the customer may use in whole or in part and in any one or a combination of transmission modes, such as telegraph, voice, data, telephoto, facsimile. If the customer activates the entire 240 kHz spectrum for voice channels, it would constitute a 100 percent utilization of the carrier spectrum. If, however, the customer were to activate the entire spectrum for telegraph transmission, the 2 to 1 equivalency provision would arbitrarily limit the amount of carrier spectrum actually utilized to only *one-ninth* of the 240 kHz bandwidth. This arbitrary limitation of carrier spectrum made available for telegraph service is in effect a surcharge for telegraph-grade service. (In addition, because of the loss of revenues from terminal charges, there would be a reduction in the amount of revenue which would be obtained by the carrier if full utilization of the 240 kHz spectrum were permitted.) The limitation of a TELPAK C carrier spectrum to a maximum of 120 telegraph grade channels amounts to charging the customer nine times the carrier spectrum actually required for the telegraph transmission service. Since the charging factors for a transmission line are (a) bandwidth and (b) distance, the equivalency restriction is also

like charging a customer who uses a line for telegraph service nine times the actual distance used for the transmission.

Unless and until AT&T can provide AP and the Commission with facts sufficient, if true, to justify the change in equivalency, the equivalency change should be rejected by the Commission without awaiting a lengthy hearing. See *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956) (the requirement in 47 U.S.C. § 309(b) (1964) for a "full hearing" does not require the Commission to "waste time on applications that do not state a valid basis for a hearing").

C. The Commission Acted Arbitrarily and Capriciously in Accepting the TELPAK Rate Increases While AT&T Was Earning in Excess of the Rate of Return Authorized by Order of the Commission

The total rate increases for TELPAK service, TWX and program transmission services were designed by AT&T to "increase the Bell System's interstate revenues by approximately \$87 million on an annual basis" using the end-of-1969 market (App. 281). These rate increases were filed with the Commission "[i]n recognition of the Statement of Ratemaking Principles and Factors in Docket No. 16258" (App. 280). However, the rate increases were filed in direct contravention of the Commission's earlier orders in Docket 16258 limiting AT&T to an overall rate of return in the range of 7.0 to 7.5 percent (*General Rate Investigation*, 9 F.C.C.2d 30, 88, 115-16 (1967)) and requiring AT&T to file any interim rate adjustments in that proceeding for action by the Commission (*General Rate Investigation*, 2 F.C.C.2d 142, 143, 147 (1965)). As shown in Commissioner Johnson's dissent in the "continuing surveillance" proceedings, "Bell's interstate rate of return has never fallen below 7.5% since 1961! (The rates of return have been: 1961—7.72%; 1962—7.55%; 1963—7.51%; 1964—7.99%; 1965—7.95%; 1966—8.29%; 1967—8.25%; 1968—

7.60%)" (FCC News Release, November 5, 1969, 21 F.C.C. 2d 654, 659, App. 572, 581). In 1969 and 1970, AT&T's return was "expected to exceed 8 percent" (*id.* at 654, App. 572; *see id.* at 659, App. 586).¹⁶

There can be no doubt of the Commission's authority under Section 205 of the Communications Act, 47 U.S.C. § 205 (1964), "after full opportunity for hearing . . . [to prescribe] maximum or minimum or maximum and minimum, charge or charges to be thereafter observed" Nor can there be doubt of the Commission's authority to require that all interim rate adjustments pending the hearings be approved by it before they become effective. *See, e.g., American Commercial Lines, Inc. v. Louisville & N.R.R.*, 392 U.S. 571 (1968); *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

At the outset of the General Rate Investigation, the Commission recognized that circumstances might warrant rate increases before it could finally adjudicate the proper rate levels for the various AT&T services, but that orderly administrative procedures required that prior Commission approval be obtained before making interim rate adjustments. The Commission in one of its first procedural orders in that case provided that:

"Respondents [AT&T and associated telephone companies] shall indicate the specific rate adjustments, if any, which they consider should be made on an interim basis in the light of such [cost] study results and the ratemaking principles and factors advocated by them." 2 F.C.C.2d at 143.

The Commission specifically ordered:

"That upon completion of the receipt of evidence relating to phase 1, consideration will be given to what action, if any, may be taken by the Commission to

¹⁶ This inability of the Commission to enforce its order is perhaps the most significant indictment of the procedures that have been adopted in these proceedings.

effect interim rate adjustments as may be warranted on the basis of the record thus far made. . . ." *Id.* at 147.

This order clearly precluded any carrier-initiated rate adjustments during this proceeding, Phase I of which was only terminated by Order released February 24, 1970 (21 F.C.C.2d 495). The procedures adopted in the 1965 Order were designed to permit adjustments to be made, *if necessary*, "as promptly as possible" but *only* "within the framework of as sound and reasonable a base of total revenue requirements as it is possible to determine pending resolution of all of the issues raised by this proceeding." *Id.* at 143.

To this end, the Commission held extensive hearings on rate of return for Bell's interstate service and concluded "that a fair rate of return is in the range of 7 to 7½ percent," and ordered immediate reductions in revenues of \$120 million. *General Rate Investigation, supra*, 9 F.C.C. 2d at 88, 115-16. This rate of return is the only return that has been adjudicated for AT&T, and since Phase 1B of the investigation was still continuing at the time the rate increases were filed, the Commission retained jurisdiction under its original orders to *order* interim rate adjustments in Docket 16258 to reduce the levels of AT&T's earnings to within that range. If the time and toil of the Commission, AT&T, and the user parties in Docket 16258 is to mean anything, it must mean that for the duration of Docket 16258, AT&T should be restricted to this range of earnings. However, even with the subsequent filed message toll reductions, AT&T will be earning well in excess of this range of reasonableness.¹⁷ See FCC News Release,

¹⁷ The Commission in its 1967 Order fixing the rate of return cautioned that its order was:

"not to be construed to mean that any future level of earnings which exceeds 7.5 percent or falls below 7 percent will warrant immediate action looking toward rate adjustments. Whether or not remedial action will

November 5, 1969, 21 F.C.C.2d 654 (App. 572); Letter from FCC Chairman Dean Burch to Senator Warren G. Magnuson, December 10, 1969 (App. 667).

The proper course for the Commission to follow when faced with a rate increase when a regulated carrier is admittedly earning in excess of that ordered is that followed by the FPC in *Texas Eastern Transmission Corp.* 18 F.P.C. 130 (1957). There, the FPC was faced with a tariff which would permit the natural gas company to earn more than the amount the FPC had authorized some three years earlier, and the FPC rejected the filing as unlawful on its face. So should the FCC reject the TELPAK rate increases.

II.

THE COMMISSION'S FAILURE TO REVEAL THE GROUNDS FOR DENIAL OF THE RELIEF REQUESTED BY AP OR EVEN TO CONSIDER THE EFFECT OF THE EQUIVALENCY CHANGE REQUIRES A REVERSAL OF THE COMMISSION'S ORDER

AP, on October 9, 1969, petitioned the Commission specifically to reject the change in equivalency for the failure of this revision to conform to the requirements either of the Communications Act or the Commission's own tariff regulations (App. 361). This tariff revision was void on its face. The Commission by its order of November 6, 1969, does not discuss or recognize the fundamental distinction between the change in equivalency and the other aspects of the rate increases¹⁸ nor does it mention com-

be required will depend upon all relevant circumstances obtaining at the time." 9 F.C.C.2d at 116.

This caveat does not, however, permit rate adjustments to be filed at will outside of this range, and no evidence has been received in this or any other proceeding open to the public that indicates that circumstances warrant a greater return.

¹⁸ On reconsideration, the Commission recognized that the injury to users from the change in equivalency could not be recompensed through an accounting order. 21 F.C.C.2d at 6 (App. 730). In its November 6 Order, the Commission stated that "accounting procedures should be sufficiently accurate to ensure all customers are recompensed." 20 F.C.C.2d at 387 (App. 563).

pliance of the filing with the Communications Act or its own rules. See 20 F.C.C.2d at 385-86 (App. 561).

Thus, the Commission has given this Court on review no guidance as to the basis for its action. It is not sufficient for Commission counsel to assert that the defects in the tariff filing were "insignificant" (FCC Opposition to Applications for Extraordinary Relief, p. 21) since Commission counsel cannot supply reasons where the Commission has not.¹⁹ See *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943).

In a recent case, *WAIT Radio v. F.C.C.*, 135 U.S. App. D.C. 317, 418 F.2d 1153 (1969), this Court explained that:

"an agency or commission must articulate with clarity and precision its finding and the reasons for its decisions. The importance of this requirement is inherent in the doctrine of judicial review which places only limited discretion in the reviewing court." 135 U.S. App. D.C. at 320, 418 F.2d at 1156. See also *Trailways of New England, Inc. v. CAB*, 412 F.2d 926, 931 (1st Cir. 1969).

However, the Commission in *WAIT Radio*, as the Commission in this case, gave insufficient reasons for its action and was reversed for further proceedings. Then "presumption of regularity" which a reviewing court accords administrative action only obtains when there is evidence that the agency has "conscientiously considered the issues". See *Braniff Airways, Inc. v. CAB*, 126 U.S. App. D.C. 399, 406, 379 F.2d 453, 460 (1967). Here, there is not the slightest indication that the Commission considered AP's petition at all, let alone "conscientiously".

¹⁹ Commission Counsel's other argument that "Section 204 requires only that the carrier (AT&T) has the right to a statement of reasons for the suspension" (FCC Opposition to Applications for Extraordinary Relief, p. 20) is nothing short of astounding, especially since AP's petition was for rejection under Sections 4(i) and 303(r) of the Communications Act, not for suspension under Section 204. Of course, Section 6(e) of the Administrative Procedure Act, 5 U.S.C. § 555(e) (Supp. IV, 1969), expressly entitles AP to "a brief statement of the grounds for denial" of its petition.

Contrary to any "presumption of regularity," the inconsistency of the Commission's action accepting the equivalency change, for which no justification was offered by the carrier, and instituting a rulemaking proceeding to "restate" in more explicit terms the existing requirements because carriers had not been complying with the rules raises "danger signals that cannot be ignored or bypassed". *Joseph v. FCC*, 131 U.S. App. D.C. 207, 212, 404 F.2d 207, 212 (1968).

III

THE REFUSAL OF THE COMMISSION TO REJECT THE CHANGE IN EQUIVALENCY IS A FINAL ORDER SUBJECT TO IMMEDIATE JUDICIAL REVIEW IN THIS COURT

Section 402(a) of the Communications Act (47 U.S.C. § 402(a) (1964)) and Section 2 of Judicial Review Act (28 U.S.C. § 2342) (Supp. IV, 1969) give the "court of appeals . . . exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the Federal Communications Commission"

The test of finality for review is whether the effect of the Commission's action is to "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." *Chicago & So. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948). This Court has applied this test to proceedings under the Judicial Review Act. See, e.g., *Bethesda-Chevy Chase Broadcasters, Inc. v. FCC*, 128 U.S.App.D.C. 185, 186, 385 F.2d 967, 968 (1967); *Isbrandtsen Co. v. United States*, 93 U.S.App.D.C. 293, 297, 211 F.2d 51, 55, cert. denied, 347 U.S. 990 (1954). Put another way, "[a]n order of an administrative body is reviewable when action taken in advance of hearings or adjudication results in the setting of legal consequences" *Cities Serv. Gas Co. v. FPC*, 255 F.2d 860, 863 (10th Cir.), cert. denied, 358 U.S. 837 (1958).

Under these tests, the refusal of the Commission to reject the TELPAK rate increases is final for review pur-

poses. The rights of AP will be fixed for an indefinite period if the change in equivalency is not rejected. As long as the tariff remains in effect, the legal consequence will be to require AP to arrange its TELPAK section based on the 2 to 1 equivalency.

The refusal of an agency to reject a rate filing has consistently been held reviewable even though agency hearings are yet to be held. *See, e.g., United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *Memphis Light, Gas & Water Div. v. FPC*, 102 U.S.App.D.C. 77, 79-80, 250 F.2d 402, 404-05 (1957), *rev'd on other grounds*, 358 U.S. 103 (1958); *Isbrandtsen Co. v. United States*, *supra*.

CONCLUSION

The Commission's decision below should be reversed, and the Commission should be ordered to reject 7th Revised Page 81 of AT&T Tariff F.C.C. No. 260 as void and having no legal effect.

Respectfully submitted,

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ADDENDUM

Statutes and Rules Involved

Communications Act of 1934, 48 Stat.
1064, 47 U.S.C. §§ 151 et seq. (1964):

Section 1. 47 U.S.C. § 151 (1964):

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

Section 4(i). 47 U.S.C. § 154(i) (1964).

(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

Section 4(j). 47 U.S.C. § 154(j) (1964):

(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.

Section 201(b). 47 U.S.C. § 201(b) (1964):

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful

Section 203(b), 47 U.S.C. § 203(b) (1964):

(b) No change shall be made in the charges, classification, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions.

Section 204, 47 U.S.C. § 204 (1964):

Whenever there is filed with Commission any new charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, but not for a longer period than three months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed change of charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased charges as by its decision shall be found not justified. At any hearing

involving a charge increased, or sought to be increased, after the organization of the Commission, the burden of proof to show that the increased charge, or proposed increased charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing a decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Section 303(r), 47 U.S.C. § 303(r) (1964):

Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—

* * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act

Section 402(a), 47 U.S.C. § 402(a) (1964):

(a) Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in Public Law 901, Eighty-first Congress, approved December 29, 1950.

Judicial Review Act, 28 U.S.C.
§§ 2342 et seq. (Supp. IV, 1969):

Section 2, 28 U.S.C. § 2342 (Supp. IV, 1969):

The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—(1) all final orders of the Federal Communications Commission made reviewable by Section 402(a) of Title 47

Administrative Procedure Act, 5 U.S.C.
§§ 551 et seq. (Supp. IV, 1969):

Section 6(e), 5 U.S.C. § 555(e) (Supp. IV, 1969):

Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other

request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

Rules of the Federal Communications Commission:

Section 61.33(a), 47 C.F.R. § 61.33(a) (1970):

All publications filed with the Commission shall be accompanied by a letter of transmittal (Here give a statement showing in detail the reasons for all changes in charges or regulations and in case any such change results in increased charges, the facts upon which the carrier relies in justification thereof.)

Section 61.36, 47 C.F.R. § 61.36 (1970):

Tariff publications which have been tendered to the Commission for filing or which have been received by the Commission in the ordinary course of business will not be returned to the carriers, unless rejected for cause.

Section 61.55(e), 47 C.F.R. § 61.55(e) (1970):

Symbols, reference marks, abbreviations. Explanation of symbols, reference marks and abbreviations of technical terms used in tariffs. The following symbols shall be used in tariffs for the purposes indicated below and they shall not be used for any other purposes:

R to signify reduction.

I to signify increase.

C to signify changed regulation.

T to signify a change in text but no change in rate or regulation.

S to signify reissued matter.

N to signify new rate or regulation.

D to signify discontinued rate or regulation.



**BRIEF FOR THE AIRLINE INDUSTRY PETITIONERS: AIR
TRANSPORT ASSOCIATION OF AMERICA, UNITED
AIR LINES, INC., EASTERN AIR LINES, INC., EMERY
AIR FREIGHT CORPORATION, and AERONAUTICAL
RADIO, INC.**

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,839

AIR TRANSPORT ASSOCIATION OF AMERICA, ET AL., *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES
OF AMERICA, *Respondents.*

United States Court of Appeals
for the District of Columbia Circuit
AMERICAN TELEPHONE AND TELEGRAPH COMPANY and THE WESTERN
UNION TELEGRAPH COMPANY, *Intervenors.*

No. 23,842

AERONAUTICAL RADIO, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES
OF AMERICA, *Respondents.*

AMERICAN TELEPHONE AND TELEGRAPH COMPANY and THE WESTERN
UNION TELEGRAPH COMPANY, *Intervenors.*

(Consolidated with Case Nos. 23,833, 23,836, 23,841, and 23,843)

**Petitions To Review Orders of the Federal
Communications Commission**

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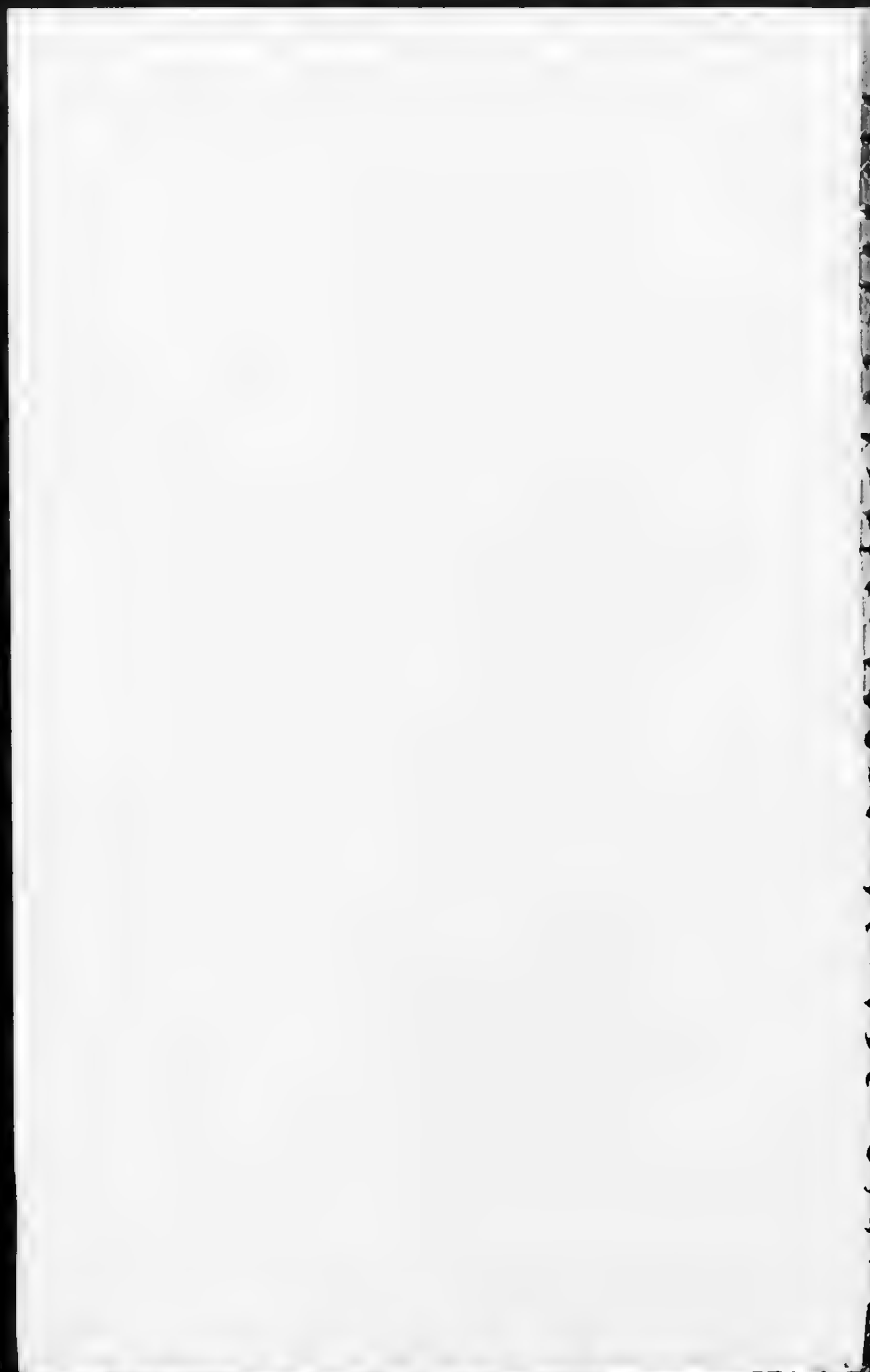


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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,833

THE ASSOCIATED PRESS, *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES
OF AMERICA, *Respondents.*

AMERICAN TELEPHONE AND TELEGRAPH COMPANY and THE WESTERN
UNION TELEGRAPH COMPANY, *Intervenors.*

No. 23,836

AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES
OF AMERICA, *Respondents.*

AMERICAN TELEPHONE AND TELEGRAPH COMPANY and THE WESTERN
UNION TELEGRAPH COMPANY, *Intervenors.*

No. 23,839

AIR TRANSPORT ASSOCIATION OF AMERICA, ET AL., *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES
OF AMERICA, *Respondents.*

AMERICAN TELEPHONE AND TELEGRAPH COMPANY and THE WESTERN
UNION TELEGRAPH COMPANY, *Intervenors.*

No. 23,841

AMERICAN TRUCKING ASSOCIATIONS, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES
OF AMERICA, *Respondents.*

AMERICAN TELEPHONE AND TELEGRAPH COMPANY and THE WESTERN
UNION TELEGRAPH COMPANY, *Intervenors.*

No. 23,842

AERONAUTICAL RADIO, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES
OF AMERICA, *Respondents.*

AMERICAN TELEPHONE AND TELEGRAPH COMPANY and THE WESTERN
UNION TELEGRAPH COMPANY, *Intervenors.*

No. 23,843

NATIONAL ASSOCIATION OF MOTOR BUS OWNERS, *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES
OF AMERICA, *Respondents.*

AMERICAN TELEPHONE AND TELEGRAPH COMPANY and THE WESTERN
UNION TELEGRAPH COMPANY, *Intervenors.*

**BRIEF FOR THE AIRLINE INDUSTRY PETITIONERS: AIR
TRANSPORT ASSOCIATION OF AMERICA, UNITED
AIR LINES, INC., EASTERN AIR LINES, INC., EMERY
AIR FREIGHT CORPORATION, and AERONAUTICAL
RADIO, INC.**

(Petitioners in Nos. 23,839 and 23,842)

**Petitions To Review Orders of the Federal
Communications Commission**

THE ISSUES PRESENTED FOR REVIEW

1. Whether it constituted apparent prejudgment for the Commission and the regulated common carrier to agree, by ex parte, off-the-record, private surveillance negotiations, closed to interested users, to couple decreases in one class of service with increases in the rates of another class of service, where the pre-existing levels of the increased rates were the subject of undetermined adjudicatory proceedings to which the interested users were parties.

2. Whether the Commission should have permitted a carrier to pyramid successive massive rate increases, aggregating more than 100%, during the pendency of proceedings to determine the lawfulness of the original level of rates in relation to levels for other classes of service, and while the carrier was already earning a rate of return in excess of its authorized range of return.

3. Whether the Commission should have permitted a carrier to file a second round of large rate increases under circumstances which violated the spirit, if not the letter, of basic terms of an agreement entered into by the carrier, the Commission's staff, and interested users of the carrier's service, and accepted by the Commission itself.

4. Whether the Commission should have rejected the second round of rate increases shown on their face to be in several material respects invalid and in violation of its Rules and Regulations.

5. Whether an accounting is a full and adequate remedy to protect the petitioners-users if they prevail on the merits before the Commission.

6. Whether the Commission had plenary power and an affirmative responsibility, under all the circumstances, to reject the second round of proposed rate increases.

7. Whether, under all the unusual circumstances of this case, it was not arbitrary, capricious, and an abuse of discretion for the Commission to refuse to reject the further rate increases in question.

This case has not previously been before this Court on the merits. A motion for stay was denied by a panel of the Court on January 29, 1970. Part of the background of this case is found in *American Trucking Associations v. FCC*, 126 U.S.App.D.C. 236, 377 F.2d 121 (1966), cert. den. 386 U.S. 943 (1967).

REFERENCES TO RULINGS

The Commission set forth the basis of its orders presented for review by this Court in a Memorandum Opinion and Order, FCC 69-1196, 20 F.C.C.2d 383, JA p. 558, adopted October 29, 1969, released November 6, 1969, and in a Memorandum Opinion and Order denying petitions for reconsideration, FCC 70-75, 21 F.C.C.2d 1, JA p. 724, adopted January 16, 1970, released January 19, 1970.

STATUTES AND RULES INVOLVED

Pertinent provisions of the Federal Communications Act of 1934, as amended, the Administrative Procedure Act, and the Rules and Regulations of the Commission, are set forth in Appendix A to this brief.

STATEMENT OF THE CASE

TELPAC is a bulk communications tariff offering by the American Telephone and Telegraph Company (AT&T) to large volume communications users, including the Federal and state governments, government-regulated carriers (such as the airlines, the railroads, the truckers, and the bus operators), and other large users such as the aerospace industry. It is a "private line" offering, in that it permits a user to lease equipment and service for direct communications between specified points and includes telephone, telegraph, teletypewriter, and data transmission.

TELPAC was first offered in 1961. Following an extensive hearing, the Commission determined in 1964 that TELPAK A and B (offerings of 12 and 24 equivalent voice circuits) were unduly discriminatory, but it also held that the larger tariff offerings of TELPAK C and D (60 and 240 equivalent voice circuits) were "apparently justified by competitive necessity", because large users were able to turn to privately-owned microwave communications systems as a competitive alternative. Having concluded that TELPAK C and D, if "*compensatory*," were thus valid and appropriate separate tariff offerings, the Commission remanded for further hearing the *single unresolved question whether the original TELPAK C and D rates were compensatory*.¹ On appeal, this Court affirmed.²

On remand, petitioners urged that this unresolved and remanded issue be determined in the then existing proceeding, the *TELPAC Case*. Instead, the Commission terminated that proceeding, and ordered that the remaining issue be folded into another proceeding, the *AT&T General Rate Investigation*, Docket No. 16258, which it had undertaken to examine into rate making in composite for the over-all interstate AT&T system.³ This issue, whether the original TELPAK C and D rates were compensatory,

¹ *TELPAC Case*, Docket No. 14251, 38 F.C.C. 370, 37 F.C.C. 1111 (1964), petitions for reconsideration denied, 38 F.C.C. 761 (1965).

² *American Trucking Associations v. FCC*, 126 U.S. App. D.C. 236, 377 F.2d 121 (1966), cert. den. 386 U.S. 943 (1967).

³ *AT&T General Rate Investigation*, FCC 66-1005, 7 F.C.C.2d 30 (1966), JA p. 7, FCC 66-1188, 6 F.C.C.2d 177 (1966), JA p. 16.

has never been determined, but again and again the Commission has consistently assured the parties that the issue exists and the parties are entitled to a hearing and determination of this issue.⁴

On the basis of an extensive evidentiary record in Phase I-A of the *AT&T General Rate Investigation*, the Commission concluded that a fair rate of return to AT&T on its interstate operations is in the range of 7 to 7½ percent, and directed AT&T to reduce its rates to produce a reduction of \$120 million in annual interstate revenues.⁵ In Phase I-B of the *AT&T General Rate Investigation*, the Commission was concerned with general ratemaking principles and factors, the *levels* of rates of each of the classes of service (including TELPAK) offered by AT&T, and the *rate relationships* among the classes of service. The Commission emphasized again and again that it would not consider individual rates *within* a class of service until it had *resolved* the applicable general issues of Phase I-B,⁶ as a matter of "threshold essentiality" to any determination of internal rate structure matters.⁷

On January 9, 1967, AT&T filed in Docket No. 16258 proposed rate increases for TELPAK C and D, at the same level as that now effective, not to become effective "until the latter part of 1967".⁸ When the tariff filing was made by Transmittal No. 10001 submitted on February 1, 1968, it aroused a storm of protest from users, and was subse-

⁴ FCC 69-842, 18 F.C.C.2d 761, 768 (1969), FCC 68-388, 33 Fed. Reg. 5900 (1968), FCC 68-711, 13 F.C.C.2d 853 (1968). There is attached as Appendix B hereto a chronological recitation of pertinent events, and the progression of Commission proceedings, while this and other issues have remained unresolved.

⁵ FCC 67-776, 9 F.C.C.2d 30, 88, 114-16 (1967), FCC 67-1047, 9 F.C.C.2d 960 (1967).

⁶ *Service Point Case*, FCC 66-71, 2 F.C.C.2d 359 (1966); *Sports Network Case*, FCC 66-403, 3 F.C.C.2d 618, 624 (1966), FCC 67R-62 (1967) (Review Board); *TELPAK Case*, FCC 66-1005, 7 F.C.C.2d 30 (1966), FCC 66-1188, 6 F.C.C.2d 177 (1966); *TELPAK Sharing Case*, FCC 67-612, 8 F.C.C.2d 178 (1967).

⁷ *TELPAK-Private Line Case*, 68-711, 13 F.C.C.2d 853, 865 (1968), JA p. 180.

⁸ JA p. 22. Under Section 203(d) of the Communications Act, 47 U.S.C. § 203(d), the Commission may reject and refuse to file any schedule which does not provide and give lawful notice of its effective date.

quently withdrawn by AT&T.⁹ As AT&T had noted in its opposition to the petitions to reject:¹⁰

“Reduced to their simplest terms the arguments common to each of these pleadings run as follows: the Commission has implied statutory authority to reject or order withdrawal of the tariff filing because a filing of TELPAK rate revisions at this time is contrary to Commission orders in Docket No. 16258, and such filing will ‘undermine the integrity’ of the latter proceeding and will deprive petitioners of procedural rights, more especially an alleged right to an adjudication of the issue as to whether existing TELPAK rates are compensatory.”

Instead, AT&T filed substantial, but lesser, TELPAK increases which the Commission, over protests by users, permitted to become effective after suspension for the three-month period provided in Section 204 of the Communications Act, with an accounting, and instituted a hearing thereon in a new FCC Docket, No. 18128. The Commission’s order implicitly recognized the understanding that there would be no further rate increases *pendente lite*, i.e., the interim rate increases were to remain in effect unless and until the Commission permitted some different level, after appropriate findings in some formal proceeding—“in the event a complete hearing record [so] indicates”.¹¹

The Commission is cognizant of the fact that the record in Docket No. 16258 is not complete as regards TELPAK C and D, since A.T.&T.’s evidence has not yet been fully examined, and the users of service under the TELPAK tariff, a number of whom are parties intervenor to the proceeding, have not yet had the opportunity to put on their cases in opposition. Presumably, such intervenors will seek to establish that the present rates are in fact compensatory, and that competitive necessity requires their maintenance at the present level. Moreover, we are cognizant of our conclusion in the original TELPAK case that the TELPAK C and D rates were apparently justified by com-

⁹ JA p. 134.

¹⁰ JA pp. 89-90.

¹¹ FCC 68-388, 33 Fed. Reg. 5900 (1968), JA pp. 171-72 (Emphasis added); FCC 68-711, 13 F.C.C.2d 853 (1968), JA pp. 180-81.

petitive necessity, provided, however, that they be shown to be compensatory.

* * * * *
 " * * * [I]t should clearly be understood by the TELPAK users, that, **in the event a complete hearing record indicates** that increases in the level of TELPAK rates are justified or required, or that the TELPAK classification should be eliminated, any increases *occasioned thereby* will become effective without delay."

Thereafter, in denying petitions for reconsideration and for other relief, the Commission disclaimed any authority under the Act to do more than suspend the rates for three months.¹²

The first round of TELPAK rate increases was designated for hearing in Docket No. 18128 in July, 1968, but that hearing is yet to commence, although Section 204 of the Communications Act provides that the Commission shall give to the hearing and decision on questions whether rate increases are just and reasonable "*preference over all other questions pending before it and decide the same as speedily as possible.*"¹³ The Commission instead ordered that there be a "temporary deferral" of the hearing concerning these TELPAK rate increases until the determinations were made of applicable general ratemaking principles in Phase I-B of the *AT&T General Rate Investigation*, Docket No. 16258, as well as the validity of certain sharing provisions in another case, Docket No. 17457 (which is awaiting Commission decision).¹⁴

One year later, Phase I-B was terminated by agreement, without any agreement on principles, but only on the method of terminating the proceeding (as pointed out by Commissioner Johnson, dissenting).¹⁵ On May 28, 1969, after approximately 100 days of hearing, 12,000 pages of testimony, and voluminous exhibits, after some cost studies had been admitted into evidence but others only offered

¹² FCC 68-872, 14 F.C.C.2d 564, 566-67 (1968), JA p. 205.

¹³ 47 U.S.C. § 204 (Emphasis added).

¹⁴ FCC 68-711, 13 F.C.C.2d 853, 857 (1968), JA p. 181.

¹⁵ FCC 69-842, 18 F.C.C.2d 761, 775 (1969), JA p. 241.

for identification or only distributed, before any fully distributed cost studies had been subjected to cross-examination, and before any parties had been afforded the opportunity to present what was anticipated to be voluminous rebuttal testimony, the parties agreed, largely at the instances of AT&T and the Commission's staff, to "bob tail" Phase I-B of the *AT&T General Rate Investigation*, and to have the carrier undertake *new* long run incremental and fully distributed cost studies.¹⁶

The parties actively participating in Phase I-B, including AT&T, the Commission's Common Carrier Bureau, and the Airline Industry Parties and other communications users, agreed upon a statement of rather general and more or less non-controversial ratemaking principles and factors, and upon further procedures which were approved by the Commission (except in one particular not here pertinent), which provided in part:¹⁷

"In order to determine l.r.i.c. [long run incremental costs] and f.d.c. [fully distributed costs] for the major categories of interstate services, the Bell System, in consultation with the FCC staff, will undertake to develop appropriate methods to be used in the production of l.r.i.c. and f.d.c. studies at regular predetermined intervals and will go forward as promptly as possible to produce up-to-date cost data. By such formal or informal procedures as the Commission deems appropriate, *interested parties will be afforded a timely opportunity to express their views with respect to the formulation of the appropriate methods.*

• • • • •

"As recognized above, the agreed ratemaking principles and factors herein contained are, of necessity, rather general and nonexclusive. An adjudication of other relevant and more specific principles and factors will be required in connection with a Commission de-

¹⁶ 18 F.C.C.2d at 765-69, JA pp. 220-26.

¹⁷ 18 F.C.C.2d at 767, 768, JA pp. 224-25 (Emphasis added). The Commission said, 18 F.C.C.2d at 764, "it is our judgment that the proposed procedures will provide a better and more timely method of reaching a final conclusion on these important matters and will best conduce to the proper exercise of our statutory authority and promote the ends of justice. We, therefore, note the Stipulation (without necessarily approving it) and approve the procedures, except as stated * * *."

termination as to the appropriate rate level for any category of service. *No carrier initiated rate level increases will be filed until the new cost studies . . . have been completed and made available to the parties hereto.* The effective date of any such rate level increase will be subject to such authority as the Commission may possess. *The parties do not agree as to the scope of the Commission's authority under various circumstances to reject, suspend or postpone the effectiveness of carrier initiated rates, and no party, by this agreement, waives its position on this question.* If, pursuant to the foregoing, a rate level increase is to become effective, it should be subject to an accounting order upon an appropriately supported request of an affected person."

Several meetings were held attended by representatives of the Commission's staff, AT&T, and interested users, and between AT&T and airline representatives, *but without any meaningful opportunity afforded to comment on the formulation of the methods.* To the extent that there were any statements at all with respect to the methods and techniques being pursued by AT&T, they were generally vague, lacking in specificity, and suggestive only that different methods would be employed without identifying the methods. Because it was said that the long run incremental cost study involved such complexities and new paths that the techniques and methodology were unfolding and being developed as the study proceeded, *the study was completed for all practical purposes before a description of the procedures employed was presented in any substantial detail.* Thus, any changes which might have been suggested by interested persons when details were finally disclosed were out of the question, because of the deadline, self-imposed by AT&T, to present its cost studies to the Commission by October 1, 1969. Indeed, *the first disclosure of the alleged costs produced by the methodology unilaterally adopted by AT&T was not made until two days before the filing of the proposed rate increases.* At the same time, the market studies which underlay the actual rate increases proposed were based on the views of "in-house" AT&T account managers selected on a sample basis and reviewed by "in-

house" AT&T supervisors. There was no consultation with a single customer on its plans, intentions, options, or reactions to various test schedules of proposed rates, and no disclosure of the details of the reports so that customers could test the accuracy and completeness of what some other persons, AT&T's employees, thought they thought.¹⁸

Despite the "refinements" in the elaborately contrived cost and market studies, AT&T ended up proposing *precisely the identical rates which had been suggested by AT&T almost three years before*. The further TELPAK rate increases were filed under AT&T Transmittal No. 10609 on October 1, 1969, and impose a most substantial "second bite" on all TELPAK users:¹⁹

	Original Tariff	First Increases 9/1/68	Percent Increase	Second Increase 2/1/70	Percent Increase
Base Capacity (Per Airline Mile Per Month):					
TELPAK C (Type 5700)	\$25.00	\$28.00	12%	\$30.00	7%
TELPAK D (Type 5800)	45.00	60.00	33	85.00	42
Service Terminals, Connecting Arrangements (Per Month)	15.00	25.00	67	35.00	40
Additional Terminals and Arrangements (Per Month)	5.00	10.00	100	15.00	50
Telegraph/Telephone Equivalency	12:1	6:1	100	2:1	200

TELPAK C and D are ordered in packs of 60 and 240 *equivalent* voice channels, respectively. With respect to telegraph/telephone equivalency, modern technology permits 18 telegraph channels to be derived from one voice channel; the latest TELPAK tariff goes in the opposite direction from technology, and permits only 2 telegraph channels to be derived from one voice channel.

As promptly as possible thereafter, airline industry parties filed with the Commission a comprehensive petition to reject or to secure or require the withdrawal of the further rate increases, for the reasons, inter alia: they are predicated upon an excessive, unauthorized rate of return, and would increase profits to AT&T; they would pyramid

¹⁸ JA pp. 335-347.

¹⁹ JA p. 427.

massive rate increases without a determination of previous and existing rates and unresolved issues; they would violate the agreement on further procedures, for meaningful participation of interested parties and basic costing and market study procedures to be followed; and they would cause irreparable injury for which accounting would be an inadequate remedy.²⁰ For the airline industry alone, it was estimated that the last rate increase would increase TELPAK costs by approximately \$17 million per year, based on a December 1, 1969, TELPAK inventory:²¹

	<u>Original Tariff</u>	<u>Interim Increases 9/1/68</u>	<u>Further Increases 2/1/70</u>
Airline TELPAK Charges	\$26,000,000	\$37,000,000	\$54,000,000
Amount of Increases Over Previous Rates		11,000,000	17,000,000
Per Cent of Increase Over Previous Rates		42%	46%
Total Amount of Increase			28,000,000
Total Per Cent of Increase			108%

The rate increases, which have generally an inflationary effect, have a particularly severe effect upon the airline industry, because the airlines are now realizing only a 4.2% rate of return, and will have an estimated 3.7% rate of return in 1970, even with recently granted fare increases, and assuming no new air carrier taxes.

Petitions requesting similar relief were filed by the Department of Defense on behalf of all Executive Agencies of the United States, the Associated Press, the aerospace industry, the railroad industry, the trucking industry, the bus industry, and a group of manufacturers utilizing TELPAK.²² The United States Government, by far the largest user of TELPAK, with charges under the interim rates in excess of \$105,237,500 per year, estimated that the increases would raise the costs to the Executive Agencies by more than \$44 million (a 52% increase), or by more than \$81 million over the original TELPAK rates (a 118% increase).

²⁰ JA pp. 423-83.

²¹ JA p. 687.

²² JA pp. 355-422, 496-506. See JA pp. 558-59.

It averred that the Executive Agencies did not have the funds available to meet the increased charges; that if the further increases were not rejected or withdrawn there would be required "a drastic decrease or cut-back in the amount of vital communications the Department of Defense and other Executive Agencies are now receiving which would obviously be extremely detrimental to the national security"; that in addition, the Executive Agencies would be required to pay "huge termination liabilities in the event of cut-backs in service resulting from the increased rates", requiring further cut-backs because no funds were available to the Government for such termination charges; and that the proposed increase "would be clearly contrary to the public interest, since it would seriously and detrimentally affect the defense effort and the national security."²³ Other TELPAK users also described to the Commission their respective severe hardships.²⁴

By Memorandum Opinion and Order released November 6, 1969, which is the subject of these petitions for review, the Commission denied the various petitions for rejection and similar relief, stating:²⁵

"We now address ourselves to petitioners' requests for extraordinary relief and oral argument. *We fail to perceive in petitioners' pleadings sufficient circumstances that would require the extraordinary remedies they seek*, or any benefit that would accrue at this point, by granting the petitioners' request for oral argument. We have previously responded to petitioners' contention that we possess plenary power pursuant to sections 4(i), and 303(r) of the Communications Act of 1934, as amended, to accord the requested relief, in our order adopted August 28, 1968, 14 F.C.C.2d 564, and find no reason to disturb our conclusion reached therein. As to petitioners' conclusion that section 203(b) of the Communications Act of 1934, as amended, conveys sufficient authority to defer the effective date of the proposed tariff revisions in Telpak, *it suffices to say that we find no necessity for the imposition of such*

²³ JA pp. 358-59.

²⁴JA pp. 361-422, 496-506.

²⁵ FCC 69-1196, 20 F.C.C.2d 383, 386 (1969), JA pp. 561-62. (Emphasis added).

extraordinary relief. However, we are not deciding at this time the extent of our authority to grant the kind of relief petitioners request."

The Commission thereupon suspended the operation of the tariff schedule for only ninety days, so as to become effective on February 1, 1970, subject to an accounting. Although there had been no determination on a hearing record of the "correct" level of TELPAK rates, the compensatory character of the original rates, or the validity of any of Bell's studies, or their proper application, Commissioner Cox stated:²⁶

In view of the delay in correcting the discriminatory TELPAK rates, I would suspend the new tariff for only one day, or until the company files tariffs covering the off-setting reductions in message toll telephone rates which are to be made."

and Commissioner Johnson declared:²⁷

"Telpak is the service which the Commission has believed could be noncompensatory, that is, its rates do not compensate Bell for its costs and are designed to meet competition from private carriers. Even Bell's studies show a need to raise these rates."

The Commission had determined in Phase I-A of the *AT&T General Rate Investigation* that 7 to 7½% was the appropriate range of reasonableness for AT&T's rate of return on the hearing record²⁸ and had never authorized any higher rate of return, but AT&T's long run incremental cost (LRIC) studies of TELPAK rates were based on an 8½% rate of return, and AT&T has consistently earned over 8% on its over-all interstate services, with a 9% rate of return projected into 1970.²⁹ While it was already earning approximately \$167 million in excess of its authorized return, AT&T projected from the TELPAK rate increases alone an additional \$64 million, or an addi-

²⁶ 20 F.C.C.2d at 389, JA p. 563. (Emphasis added).

²⁷ 20 F.C.C.2d at 390, JA p. 566. (Emphasis added).

²⁸ FCC 67-776, 9 F.C.C. 2d 30, 88, 114-116 (1967), FCC 67-1047, 9 F.C.C.2d 960 (1967).

²⁹ See Appendix B of this brief.

tional \$87 million from rate increases in TELPAK, audio and video program transmission, and teletypewriter exchange (TWX) services,³⁰ the result being a sum total of roughly one quarter of one billion dollars over the authorized return for the carrier.

In June 1969, the Commission had informed AT&T that in keeping with its policy of "continuing surveillance",³¹ it was scheduling "discussions" to review "the continuing growth in the level of your interstate revenues and earnings, changes in the nation's economy during recent years, and the need, if any, for rate adjustments that may be required in the public interest."³² Although a reporter's record of testimony was made available for public inspection, the sessions were held behind closed doors, without any interested user group or consumer group being permitted to cross-examine AT&T witnesses, to call witnesses in opposition, or even to be present.³³

On November 5, 1969, the Commission released a public notice announcing reductions by AT&T in rates for interstate long distance calls (MTT) of \$150 million as a result of its "continuing surveillance" proceedings. For the first time the Commission also revealed that it had traded off an additional \$87 million in MTT rate reductions for \$87 million in rate increases for other classes of service, including the TELPAK rate increases, which were permitted by its order released the next day (the subject of these petitions for review) to go into effect on February 1, 1970.³⁴ The public notice recognized that the reduced rates would not, "in themselves", prevent AT&T from earning in the 8 to 8½% range, but subsequent releases of the Commission and its Chairman took pains to emphasize that the

³⁰ Letter from Vice President Garlinghouse to FCC, October 1, 1969, JA p. 280.

³¹ See *Public Utilities Com'n of State of Cal. v. U.S.*, 356 F.2d 236 (9th Cir. 1966).

³² FCC 69-638 (June 5, 1969), JA p. 211.

³³ FCC letter to Mrs. Bess Myerson Grant, Commissioner of the New York City Department of Consumer Affairs, FCC Release 37872, Report No. 3789 (September 19, 1969), JA p. 246.

³⁴ FCC 69-1196, 20 F.C.C.2d 383 (1969), JA p. 553.

Commission was not thereby indicating an acceptance or approval of earnings in this range.³⁵

The dissenting opinion of Commissioner Johnson,³⁶ described the bargaining process by which the over-all reduction in MTT rates was negotiated, in part as a trade-off with the increases in non-MTT services:

- a. "The majority [of the Commission] was seeking \$290 million through negotiations conducted by the staff and the Telephone Committee".³⁷
- b. "Bell as a counter offered \$120 million plus the offsets", or a total of \$207 million.³⁸
- c. Bell finally "agreed to reduce rates by \$240 million" [in fact \$237 million, including \$87 million in offsets to other specific increases]³⁹
- d. Then, in order to protect the impression that "some wonderful victory has been achieved for the consumer through the activities of the Commission and the benevolence of ATT"⁴⁰, "the content of the FCC majority's press release was negotiated with Bell officials who are clearly concerned as much with publicity as with profits".⁴¹

As a result of these disclosures, airline industry parties filed on November 18, 1969, a petition for reconsideration directed principally to the coupling of MTT rate reductions by private "surveillance" negotiations with TELPAK rate increases which were already the subject of unresolved adjudicatory issues, as thereby apparently prejudging the rate relationships between the classes of service.⁴² By

³⁵ Public Notice 42062 (December 11, 1969), JA p. 669; FCC 69-1407, 20 F.C.C.2d 886 (1969), JA pp. 694-95.

³⁶ FCC 69-1210 (released November 5, 1969), JA p. 575.

³⁷ Id., JA p. 579.

³⁸ Id., JA p. 580.

³⁹ Id., JA p. 579.

⁴⁰ Id., JA p. 575. It has been alleged that the agreement with the Commission "is a potential revenue increase for AT&T cleverly disguised as a rate reduction," and that against the proposed net reductions of \$150 million in interstate long distance message revenues there are pending proceedings before 16 state commissions for revenue increases of more than \$500 million from intrastate services. See remarks of Cong. Bingham, Cong. Rec. H 10710 (91st Cong., 1st Sess., November 9, 1969).

⁴¹ FCC 69-1210 (released November 5, 1969), JA p. 576.

⁴² JA pp. 594-604.

letter dated December 31, 1969, AT&T advised the Commission that it was filing the MTT reductions on January 2, 1970, and requested special permission to cancel the filing on not less than one day's notice if the offsetting TELPAK and other rate increases did not become effective on February 1, 1970.⁴³ Special permission was granted on the same day as the letter request.⁴⁴ By memorandum opinion and order adopted January 16, 1970, released January 19, 1970, for which review by this Court is here sought, the Commission denied in all particulars various petitions for reconsideration and for other relief which various parties had filed, and permitted the further TELPAK rate increases to become effective on February 1, 1970.⁴⁵

On January 5, 1970, pursuant to the provisions of Section 402(a) of the Communications Act of 1934, as amended,⁴⁶ Sections 2 and 4 of the Judicial Review Act of 1950, as amended,⁴⁷ and Section 10(e) of the Administrative Procedure Act of 1946, as revised,⁴⁸ petitions were filed in Case Nos. 23,839 and 23,842 for review of the Commission's Memorandum Opinion and Order denying petitioners' petition to reject the further TELPAK rate increases,⁴⁹ and on January 22, 1970, a petition was filed to amend the petition for review in Case No. 23,839 to include review of the Commission's Memorandum Opinion Order adopted January 16, 1970, released January 19, 1970, denying those petitioners' petition for reconsideration.⁵⁰

On January 26, 1970, the Court granted a motion by the Commission to consolidate Case Nos. 23,833, 23,836, 23,839, 23,841, 23,842, and 23,843, and granted leave to the American Telephone and Telegraph Company and the Western

⁴³ AT&T Application No. 739, December 31, 1969.

⁴⁴ Letter, Reference 9310, Chief, Common Carrier Bureau, to AT&T Administrator Rates and Tariffs, December 31, 1969.

⁴⁵ FCC 70-75, 21 F.C.C.2d 1 (1970), JA p. 724.

⁴⁶ 47 U.S.C. § 402(a).

⁴⁷ 28 U.S.C. §§ 2342, 2344.

⁴⁸ 5 U.S.C. § 706.

⁴⁹ FCC 69-1196, 20 F.C.C.2d 383 (1969), JA p. 558.

⁵⁰ FCC 70-75, 21 F.C.C.2d 1 (1970), JA p. 724.

Union Telegraph Company to intervene in all cases. On January 29, 1970, a panel of the Court heard oral argument and denied motions by petitioners in the consolidated cases for injunction and for stay pending review.

SUMMARY OF ARGUMENT

To put into proper perspective this appeal, with its rather complex procedural background, one must understand what it does not involve in order to understand clearly what it does involve.

In the first place, this case involves no questions coming within the ambit of the Supreme Court's decision in the *Arrow Transportation Company*⁵¹ case. Petitioners are not seeking equity court relief from a Commission refusal to suspend a rate increase or from a refusal to extend the statutory suspension period, or any other kind of independent court relief. Instead, petitioners seek only statutory review of the Commission's refusal to reject the second TELPAK rate increases in question, which refusal, under all the circumstances including strong indications of apparent prejudgment, was, petitioners submit, arbitrary, capricious and an abuse of discretion.

Secondly, upon this appeal, petitioners do not seek or expect any court determination on the merits or reasonableness of the second round of TELPAK rate increases which went into effect under an accounting order on February 1, 1970. By the same token, the size and impact of such rate increases are not for any kind of determination on this appeal, except as indisputable facts to be taken into account, along with AT&T's excessive rate of return, in determining whether the Commission had a responsibility, as well as the power, to reject such further rate increase, in the light of the posture of undetermined issues with respect to two prior levels of TELPAK rates.

Under a policy of "continuing surveillance" over interstate rates, the Commission from time to time holds conferences with representatives of AT&T which are private and "informal", closed to consumers of the carrier's serv-

⁵¹ *Arrow Transportation Co. v. Southern R. Co.*, 372 U.S. 658 (1963).

ices to cross-examine, to present evidence, or otherwise to participate in the give and take of negotiations, or even to be present. This practice may be saved from infirmity under the notice and hearing safeguards of statutory provisions on the theory that the resulting *reduced* rates which are so negotiated are carrier-initiated only, without Commission approval or prescription, and that the negotiations are therefore not proceedings inquiring into the lawfulness of new rates.

On the other hand, where proceedings are already pending to determine the proper rate level and rates for a particular class of service (such as TELPAK), interested parties, including users of the service, are entitled to some measure of participation, particularly where there are long-unresolved issues in an adversary proceeding to determine whether original rates have been compensatory, and whether a first round of rate increases are lawful, just, and reasonable.

When these two entirely different procedures are improperly commingled, when surveillance negotiations are utilized to set off, or trade off, rate reductions in one class of service not on its own merits or in relation to overall revenues, but, instead, in relation to rate increases in another class of service, where the propriety of pre-existing rates for the latter class is being tested in an adjudicatory proceeding, then the consumers of this latter class of service have been most seriously prejudiced by an apparent prejudgment made in a package agreement, closed to them, which has effectively bargained away their right to test on the merits the lawfulness of the pre-existing levels.

Having entered into the bargain, having applied leverage to the carrier to reduce rates in one service to offset rate increases elsewhere, the Commission has placed itself in a position where, as a practical matter, whatever the theoretical possibilities, it can hardly renege on its agreement. Under these circumstances, unless the further rate increases are precluded from becoming effective unless and until justified by determinations upon a hearing record, the in-

ference will be inescapable that the offset reduction determined by continuing surveillance negotiations has conditioned the result of the adjudicatory proceedings on the proper level of the increased rates.

There has never been a determination on the underlying compensatory issue of the original TELPAK C and D rates or the propriety of first round of TELPAK rate increases in September, 1968, or on the various allegedly supporting cost studies, as these issues have been batted like a shuttlecock from proceeding to proceeding, despite the statutory mandate to expedite hearings on rate increases and petitions by users for a prompt resolution of pre-existing hearing issues. The imposition of further rates increases during the pendency of hearings on prior rate increases seriously prejudices orderly and efficient regulatory procedure, and tends to obscure the issue of the propriety of both lower levels of rates. The imposition of successive rate increases is particularly unjustified when the carrier has consistently been receiving a rate of return considerably in excess of that ever authorized by the Commission.

Besides, the Commission should not have permitted further rate increases to become effective which violated the understanding that none would be filed unless shown to be justified on a hearing record, as well as the joint agreement among the carrier, users, and the Commission's staff that costs studies were to be undertaken with the meaningful participation of users in the development of techniques and methodology, and not be applied to tariff formulation and filing until the users had been afforded a reasonable opportunity to assimilate and evaluate the studies.

Moreover, the further rate increases should have been rejected as showing on their face that they did not conform with the requirements of the Commission's Rules and Regulations that the carrier show in detail the reasons for changes, and the facts upon which the carrier relied in justification for rate increases. For example, there was a complete failure to justify a telegraph/telephone equivalency change which would permit only two telegraph chan-

nels to be derived from one voice channel, although advancing technology goes in the opposite direction and permits 18 telegraph channels to be derived from one voice channel, and there was admittedly no independent cost justification for the change. This one component of the increased rates alone will triple the cost to the airline industry alone by more than \$3.7 million for more than 2 million channel miles of leased telegraph lines, without any redress except possibly a questionable suit for damages.

Even the carrier and the Commission admit that the accounting procedure under the suspension statute is an inadequate remedy to secure redress for additional charges imposed when users must shift from TELPAK to other services. A complaint for damages would not only be a questionable remedy, but at best inadequate, even if users were able to carry their heavy burden of proof to show the damages suffered, with the certainty and specificity required, to the greatest extent practicable, since it would not cover service repressed or new service foregone.

Whatever the limitations on the suspension powers of the agency, the Commission had full power to reject the pyramiding of rate increases such as those here involved during the pendency of adversary proceedings inquiring into the propriety of two lower levels of rates. The Commission's power does not depend upon the rate suspension provisions of the Act, but upon its more general powers in implementation of and ancillary to the effective performance of its statutory responsibilities.

Likewise, this Court has full authority to afford appropriate relief to avoid the consequences of irreparable injury, by review of the misconceived, arbitrary and capricious action of the Commission in permitting an improper "coupling" of message toll surveillance reductions with a second round of TELPAK increases and, under all the circumstances, in not rejecting such increased TELPAK rates pending some determination of the underlying contested issues.

ARGUMENT

- I. The Coupling of Rate Decreases in Private Surveillance Negotiations Between the Commission and the Carrier. From Which Users Have Been Excluded. With New Rate Increases for Other Services, the Pre-Existing Rate Levels of Which Are Being Contested in Pending Proceedings. Has Resulted in Apparent Prejudgment to the Prejudice of the Users of Such Other Services**

"Pursuant to its authority to regulate interstate telephone rates, the Commission from time to time holds what it deems 'informal' conferences with representatives of the Bell System companies as part of its policy of 'continuing surveillance' over interstate rates."⁵² It is a process which the Commission has said it has "effectively used over the years to bring about substantial reductions in interstate long distance rates."⁵³ "The theory," Commissioner Johnson has said, "is that in the context of these negotiations the Commission will be able to make an informed judgment as to what action would serve the interests of the public *and* that Bell would agree to take that action even though it is harmful to the interests of its stockholders."⁵⁴

The public, however, is not permitted to present its own views in negotiations on rate changes which directly affect its interests—consumer groups are not afforded an opportunity to cross-examine carrier witnesses, to call witnesses, to participate in the negotiations, and indeed are excluded from the closed door conferences.⁵⁵ The United States Court of Appeals for the Ninth Circuit has ruled that the "continuing surveillance" process is not per se subject to statutory requirements of notice and hearing on rulemaking action: "If the Commission's action here was not one of 'approval or prescription,' then the Commission was

⁵² *Public Utilities Com'n of State of Cal. v. U.S.*, 356 F.2d 236, 238 (9th Cir. 1966).

⁵³ Letter of Commission Chairman to Mrs. Bess Myerson Grant, Commissioner, New York City Department of Consumer Affairs, FCC Release 37872, Report No. 3789 (September 19, 1969), JA p. 246.

⁵⁴ FCC 69-1210 (November 5, 1969), JA p. 576.

⁵⁵ Note 53 *supra*. See also FCC 69-1407, 20 F.C.C.2d 886 (1969), JA p. 694.

not "rulemaking," and the Administrative Procedure Act's provisions for notice and opportunity to be heard⁵⁶ would not apply."⁵⁷ Likewise, if continuing surveillance is not a proceeding concerning the lawfulness of new rates, and the Commission has not determined or prescribed what would be just and reasonable charges for the future, it has been held that then the notice and hearing provisions of Sections 204 and 205 of the Communications Act of 1934, as amended,⁵⁸ are inapplicable.⁵⁹

However, in the Commission's own public notice on the results of these continuing surveillance discussions, it reported that in addition to the \$150 million reduction in revenues from reducing long distance telephone calls (MTT), "AT&T has previously agreed to file reductions of about \$87 million representing an *offset* in revenues resulting from higher rates recently filed for program transmission, Telpak and teletypewriter (TWX) services *when the latter increases become effective.*"⁶⁰ Although the Commission has declared, in denying various petitions for reconsideration, that the \$87 million offset "is completely independent of and unrelated to the reductions resulting from the continuing surveillance."⁶¹ *it has not denied the process of negotiations described by Commissioner Johnson in his dissent*, whereby "the majority was seeking \$290 million [\$200 million on a 7.4% rate of return plus \$90 million in offset] through negotiations conducted by the staff and the Telephone Committee", but "Bell offered to reduce MTT rates by \$240 million and the majority has accepted".⁶²

The classes of service where rate increases have been imposed *are* the subject of adjudicatory proceedings, and the parties *are* entitled to the notice and hearing safeguards of the Administrative Procedure Act and the Communications Act. In the case of TELPAK, there are unresolved

⁵⁶ Sections 2(c), 4, 7, and 8 of the Administrative Procedure Act, now 5 U.S.C. §§ 551(4), 553, 556, 557.

⁵⁷ Note 52 *supra*, 356 F.2d at 239.

⁵⁸ 47 U.S.C. §§ 204, 205.

⁵⁹ Note 52 *supra*, 356 F.2d at 240.

⁶⁰ FCC 69-1210 (November 5, 1969), JA p. 572. (Emphasis added).

⁶¹ FCC 70-75, 21 F.C.C.2d 1, 2 (1970), JA p. 725.

⁶² FCC 69-1210 (November 5, 1969), JA pp. 579-80. See page 15 *supra*.

issues, one of which has been passed from case to case since the original *TELPAC Case* was decided in 1964. The hearing rights of these consumers were not proper subjects for trading between a Commission embarked upon a venture "to bring about substantial reductions in interstate long distance rates"⁶³ and a carrier seeking the highest rate of return above its allowed range, in closed-door bargaining from which these adversely affected consumers were excluded.

The Commission, denying the petitions for reconsideration, has stated:⁶⁴

"What the Airline Parties request of the Commission is a determination, before hearing of the relative equities affecting the various customers of A.T.&T.'s service. This we will not do".

But this is precisely what the Commission has done, to the detriment of petitioners. Without completion of any hearing, much less any decision, on "the relative equities" of MTT and the other classes of services, without any notice to the users adversely affected or an opportunity being afforded to them to be heard, the Commission has opted in favor of granting a rate reduction boon to MTT at the expense of the users of the other services, while AT&T will continue to receive a rate of return substantially in excess of the range authorized by the Commission upon a hearing record.

There may be some excuse for passing on to MTT users, the \$150 million reduction in over-all revenues resulting from surveillance of over-all earnings under the authorized rate of return, in that MTT services produce over 80% of total revenues and thus provide the leverage for needed over-all reductions in earnings. However, there is no excuse for tying another \$87 million revenue reduction from *decreased* MTT rates to \$87 million of *increased* TELPAK, program transmission, and TWX rates, and especially not when *all the underlying rate relationship questions as to benefit or burden of one class of service*

⁶³ Note 53 *supra*.

⁶⁴ FCC 70-75, 21 F.C.C.2d 1, 3 (1970), JA p. 726.

upon another are the subject of pending and undetermined contested proceedings.

The Commission action of balancing further increases in TELPAK rates with decreases in MTT rates may well have been influenced by some predilection that TELPAK rates were too low, as indicated in the statements of Commissioner Cox:⁶⁵

"In view of the delay in correcting the discriminatory TELPAK rates, I would suspend the new tariff for only one day, or until the company files tariffs covering the off-setting reductions in message toll telephone rates which are to be made."

and Commissioner Johnson:⁶⁶

"Telpak is the service which the Commission has believed could be noncompensatory, that is, its rates do not compensate Bell for its costs and are designed to meet competition from private carriers. Even Bell's studies show a need to raise these rates."

There has been no determination on a hearing record, however, of the "correct" level of TELPAK rates, the compensatory character of the original rates, or the validity of any of Bell's studies or their proper application. Since the compensatory issue was remanded in the original *TELPAK Case*, petitioners have been seeking the opportunity to demonstrate that the original TELPAK rates were compensatory. Indeed, if long-run incremental costs are the proper measure of determining whether rates are compensatory, as *AT&T* and petitioners both contend as a matter of ratemaking principles, then as a matter of ratemaking application AT&T's own cost studies showed an excess profit, from the second rate increases, of \$85.2 million, or 30% over and above long-run incremental costs, including

⁶⁵FCC 69-1196, 20 F.C.C.2d 383, 389 (1969), JA p. 563. (Emphasis added). This is not the first time Commissioner Cox had indicated his strong feelings on the need for elimination of TELPAK C and D or at least a substantial increase in the level of such rates. In addition to his dissent on this point in the original *TELPAK Case* (37 F.C.C. 1111, 1119-20 (1964)), he made a public speech on March 25, 1969, in which he devoted a full section to this subject. The cover page (showing the occasion) and the full text of such section are attached as Appendix C.

⁶⁶20 F.C.C.2d at 390, JA p. 566. (Emphasis added).

an 8½% return component.⁶⁷ The point here is not that the Commission had to accept this particular cost study result but instead that it had no right to accept any contrary predilection or contrary cost study result to the effect that some further "correction" in TELPAK rate levels was "overdue" and therefore in order at this time. Without having determined any of the "threshold" questions to a determination of resulting benefits and burdens as between classes of service, the Commission simply had no right to make any assumptions as to the need for further *increase* in any rates. And when it did, particularly in the absence of any need for additional revenue by the carrier, it was inescapably guilty of apparent prejudgment to the prejudice of all users of TELPAK.

In denying the petitions to reject the further TELPAK rate increases, by the mere conclusory declaration that it could find no necessity for the imposition of the extraordinary relief requested, the Commission gave no clue that there was to be an "offset" of rate increases with decreases.⁶⁸ Thereafter, while petitions for reconsideration were pending protesting against this nexus, AT&T requested and was granted by the Commission's staff leave to withdraw the reductions in MTT rates promptly, on not less than one day's notice, *if* the TELPAK and other rate increases did not go into effect as scheduled⁶⁹—in other words, MTT users would lose the benefit of \$87 million in rate reductions if the Commission were to grant the pending petitions for reconsideration. The petitions were thereafter denied in their entirety.⁷⁰

What the Commission has done is to effect a wrongful commingling of surveillance proceedings, which relate to the carrier's over-all rate of return, with pending adversary proceedings which relate to rate levels and rates for specific classes of service. It has tried to negotiate rate levels for specific services as part of the same surveillance procedure, *without regard to the inherent and fundamental limitations*

⁶⁷ JA pp. 445-46, 488.

⁶⁸ FCC 69-1196, 20 F.C.C.2d 383 (1969), JA p. 558.

⁶⁹ AT&T Application No. 739, and letter, Reference 9310, from Chief, Common Carrier Bureau, December 31, 1969.

⁷⁰ FCC 70-75, 21 F.C.C.2d 1 (1970), JA p. 724.

imposed by the pendency of specific adversary proceedings for determination of all of the underlying questions with respect to such "rate levels" and "relationships". The basic error, conceptual in nature, lies in the failure of the Commission to perceive and observe the underlying distinctions between surveillance and adversary rate proceedings.

A package arrangement of rate changes (some under surveillance and the others in pending contested proceedings) simply cannot be made without prejudice to the rights of the parties to the adversary proceedings, who are not even parties—much less privy—to the surveillance proceedings. The inference is compelling that the Commission is "locked into" support of the TELPAK rate increases as part of its over-all agreement with AT&T, and to keep the MTT rate reductions which it was pleased to announce. AT&T has already indicated that it would use rates found to be "too low" to resist any refund of TELPAK rates found by the Commission to be "too high". Thus, in opposing a motion by the aerospace industry to amend the interest provisions of the Commission's suspension and accounting order, AT&T has stated:⁷¹

"It is possible that the Commission's final determination herein might include the prescription of new rates, some of which might be lower, and some higher, than those proposed by AT&T, or now in effect. In such circumstances, there would be no opportunity for AT&T to collect additional amounts from those customers whose charges were too low during the period of investigation. This inability of the carrier to recoup from those customers whose rates are found to have been too low may properly be considered by the Commission in determining the extent to which the ordering of refunds is proper, and whether interest on such refunds should be imposed."

This Court has recently observed that "a hearing is a hearing; is a hearing; and for a 'hearing' to pass muster in this court, it must be impeccably dressed with fairness."⁷²

⁷¹ JA p. 640. (Emphasis added).

⁷² *Sea-Land Service, Inc. v. Connor*, 418 F.2d 1142, 1146 (U.S. App. D.C. 1969).

Two recent decisions in this Court, one in March, 1970, spell out the position of this Court on questions of apparent prejudgment, and its impact on the right to a fair hearing.⁷³ In each case, the evidence of apparent prejudgment was found in a public speech of a member of the Federal Trade Commission, instead of a public notice and memorandum opinions and orders of the Federal Communications Commission, as here. And in each case, the apparent prejudgment was made the subject of a motion to disqualify, as distinguished from a motion for reconsideration in the present case. But these are distinctions without a difference in the principle to be applied, which was well stated by Circuit Judge Washington in his concurring opinion in the *Texaco* case:⁷⁴

"Once an adjudicator has taken a position apparently inconsistent with an ability to judge the facts fairly, subsequent protestations of open-mindedness on his part cannot restore a presumption of impartiality. Whether justice was in fact done is not the issue: an administrative hearing 'must be attended, not only with every element of fairness but with the very appearance of complete fairness.' We must presume that a fair hearing was denied if a disinterested observer would have reason to believe that the Commissioner had 'in some measure adjudged the facts * * of a particular case in advance of hearing it.'"

The same underlying principle was forcefully reiterated in the *Cinderella* case on March 20, 1970, by Judge Tamm:⁷⁵

"It requires no superior olfactory powers to recognize that the danger of unfairness through prejudgment is not diminished by a cloak of self-righteousness. We have no concern for or interest in the public statements of government officers, but we are charged with the

⁷³ *Texaco, Inc. v. FTC*, 118 U.S. App. D.C. 366, 336 F.2d 754 (1964), remanded on other grounds, 381 U.S. 739 (1965); *Cinderella Career and Finishing Schools, Inc. v. FTC*, Case No. 22,624 (U.S. App. D.C. March 20, 1970).

⁷⁴ 118 U.S. App. D.C. at 376, 336 F.2d at 764. District Judge Pine observed in *Jarrott v. Scrivener*, "the appearance of fairness and impartiality is probably as of great importance as its attainment, if the public is to have confidence in the judicial processes." 225 F. Supp. 827, 834 (D.C.D.C. 1964).

⁷⁵ Note 73, *supra*, slip opinion, pp. 14, 16.

responsibility of making certain that the image of the administrative process is not transformed from a Rubens to a Modigliani.

* * * * *

"The test for disqualification has been succinctly stated as being whether 'a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.' *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir.), cert. denied, 361 U.S. 896 (1959)."

It might be argued that of the six Commissioners (seven on reconsideration) joining in the refusal to reject the second TELPAK rate increases, only Commissioners Johnson and Cox made any specific statements expressly indicating an apparent prejudgment as to the proper level for TELPAK rates. However, the whole Commission joined in the agreement improperly coupling a part of the surveillance reduction in MTT rates with the increases in TELPAK and other services (Commissioner Johnson dissenting on another ground), and no Commissioner expressed any different position from that stated by Commissioners Cox and Johnson on this aspect of the agreement. This Court answered the same kind of argument in the *Cinderella* case as follows:⁷⁶

"The rationale for remanding the case despite the fact that former Chairman Dixon's vote was not necessary for a majority is well established:

Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and *there is no way which we know of whereby the influence of one upon the others can be quantitatively measured.*

* * * [W]e adopt the position of our sister circuits on this point."

The prejudice resulting from actual or apparent prejudgment can be cured only if the latest TELPAK rate increases are rescinded, and the total amount of required over-all revenue reduction by AT&T determined on its own merits, just as the proper level of TELPAK rates, in re-

⁷⁶ Id. at pp. 17-18. (Emphasis added).

lation to rates for all other classes of service, is to be determined in pending adversary proceedings. If the surveillance process continues to be coupled to hearing issues, if MTT rate reductions continue to be dependent upon maintaining the increases in TELPAK rate levels, *then the inference is compelling that the "offset" which has been determined in the course of continuing surveillance negotiations will condition the result of the TELPAK rate hearings.*

II. AT&T Has Been Permitted To Pyramid TELPAK Rate Increases, Aggregating More Than 100%, Without Any Determination of the Propriety of Previous Rate Levels or Rate Relationships, While AT&T Continues To Earn an Excessive Rate of Return

There has never been a determination of the underlying issue whether the original TELPAK rates were and would be compensatory, although the Commission has consistently assured the parties that they are entitled to a hearing and a determination of that issue, in the tentative⁷⁷ and final decision⁷⁸ in the original *TELPAK Case*, in the same case on appeal,⁷⁹ in the Commission order winding up the case on remand,⁸⁰ in its order on reconsideration,⁸¹ in the order designating the interim rate increases for hearing,⁸² in the order for an accounting,⁸³ and in the Statement of Rate-making Principles and Factors winding up Phase I-B of the *AT&T General Rate Investigation*.⁸⁴ The propriety of the first round of TELPAK rate increases has likewise been improperly deferred and remains to be resolved,⁸⁵ despite

⁷⁷ *TELPAK Case*, 38 F.C.C. 370, 395 (1964).

⁷⁸ *TELPAK Case*, 37 F.C.C. 1111, 1117-18 (1964).

⁷⁹ *American Trucking Associations v. FCC*, 126 U.S. App. D.C. 236, 377 F.2d 121 (1966), cert. den. 386 U.S. 943 (1967).

⁸⁰ *TELPAK Case*, FCC 66-1005, 7 F.C.C.2d 30 (1966), JA p. 7.

⁸¹ *TELPAK Case*, FCC 66-1188, 6 F.C.C.2d 177 (1966), JA p. 16.

⁸² *TELPAK-Private Line Case*, FCC 68-388, 33 Fed. Reg. 5900 (1968), JA p. 171.

⁸³ *TELPAK-Private Line Case*, FCC 68-711, 13 F.C.C.2d 853 (1968), JA p. 180.

⁸⁴ *AT&T General Rate Investigation*, FCC 69-842, 18 F.C.C.2d 761, 768 (1969), JA p. 225.

⁸⁵ *TELPAK-Private Line Case*, FCC 68-711, 13 F.C.C.2d 853, 857 (1968), JA p. 181.

the mandate of Section 204 of the Communications Act that the Commission must give to a hearing and decision on whether rate increases are just and reasonable "preference over all other questions pending before it and decide the same as speedily as possible."⁸⁶

Likewise, there has never been a determination of the applicable general ratemaking principles and factors, of the appropriate rate level of each class of service, and of the relationships of these rate levels among the various classes of service, determinations which the Commission has emphasized are "of threshold essentiality" to a determination of the reasonableness and lawfulness of specific rates.⁸⁷ Similarly, there has never been any determination of the validity or appropriate applicability of any of the fully distributed cost studies which have surfaced from time to time in and out of the *AT&T General Rate Investigation*, some of which have never been even identified in any hearing, and none of which has ever been subject to cross-examination and rebuttal testimony.

In all of this, the inability to secure a determination on the "threshold" issues can in nowise be ascribed to TELPAK users, who from the beginning had urged, unsuccessfully, that the compensatory character of the original TELPAK C and D rates be resolved promptly in the remanded *TELPAK Case*.⁸⁸ The result has been that the pyramiding of rate increases has seriously prejudiced orderly and efficient procedure, tending to obscure issues on the propriety of the original level of TELPAK rates. As a pragmatic consideration, it must be recognized that a full and fair determination of the propriety of a rate level is immeasurably compromised when not one but two higher levels are superimposed for consideration in the same proceeding.

This is *not* a case where *any* rate increase is necessary to permit the carrier to realize its authorized rate of return. After extensive hearings in Phase I-B of the *AT&T Gen-*

⁸⁶ 47 U.S.C. § 204.

⁸⁷ *TELPAK-Private Line Case*, FCC 68-711, 13 F.C.C.2d 853, 857 (1968), JA p. 180.

⁸⁸ *TELPAK Case*, FCC 66-1188, 6 F.C.C.2d 177 (1966), JA p. 16.

eral Rate Investigation, the Commission concluded that a range of 7 to 7½% was a reasonable rate of return, and ordered that AT&T's interstate revenues be reduced by \$120 million.⁸⁹ Notwithstanding the reductions made, however, AT&T has always continued to enjoy earnings "well in excess of 8% on interstate operations."⁹⁰ Indeed, the further TELPAK rate increases were based upon a projection by AT&T that the estimated revenues at the further rate increases will be \$348,600,000 per annum, or a profit of \$85,200,000 or 30% over and above its own long run incremental costs of TELPAK service, including a built-in 8½% return component.⁹¹

Although the Commission stated in its public notice on MTT rate reductions that it is of the view that earnings in excess of the upper limit of the 1967 adjudicated range (7.5%) are "not unreasonable", and noted that reductions in rates would not prevent AT&T from achieving earnings in the 8 to 8½% range,⁹² the Commission subsequently took pains to emphasize that it was not indicating an acceptance or approval of earnings in that range, and would shortly again be reviewing the level of earnings.⁹³ Commissioner Johnson, dissenting, has pointed out that while the *California PUC Case*⁹⁴ is often cited for the proposition that no legal redress is available for decisions reached under continuous surveillance, "the fact that the Commission recently made an on-the-record determination, and now changes it without hearing, may present a different legal situation."⁹⁵

Under all these circumstances, when AT&T has proposed to raise TELPAK rates while issues on the propriety of

⁸⁹ FCC 67-776, 9 F.C.C.2d 30, 88, 114-16 (1967), FCC 67-1047, 9 F.C.C.2d 960 (1967).

⁹⁰ *AT&T General Rate Investigation*, FCC 68-667, 13 F.C.C.2d 716 (1968); see Appendix B attached hereto.

⁹¹ JA p. 488.

⁹² FCC 69-1210 (November 5, 1969), JA p. 573.

⁹³ Public Notice 42062 (December 11, 1969), JA p. 667; FCC 69-1407, 20 F.C.C.2d 886 (1969), JA pp. 694-95.

⁹⁴ *Public Utilities Com'n of State of Cal. v. U.S.*, 356 F.2d 236 (9th Cir. 1966).

⁹⁵ FCC 69-1210 (November 5, 1969), JA p. 583; FCC 69-1407, 20 F.C.C.2d 886, 893 (1969), JA pp. 701-02.

lower rates were undetermined, and it was already earning in excess of its authorized rate of return, it is submitted that it was arbitrary and capricious for the Commission not to reject the further rate increases until some decision had been made on the underlying unresolved issues.

III. The Further Rate Increases Breached Basic Terms in an Agreement Entered Into by the Carrier, the Commission's Staff, and Users of the Carrier's Services, and Accepted by the Commission Itself

At the time the interim TELPAK rate increases were filed to become effective on September 1, 1968, the Commission recognized an understanding that there would be no further increases, *pendente lite*, until after "*a complete hearing record indicates that increases in the level of TELPAK rates are justified or required.*"⁹⁶ That hearing record is yet to be completed in the *TELPAK-Private Line Case*, Docket No. 18128.⁹⁷

Before Phase I-B of the *AT&T General Rate Investigation* was "bobtailed",⁹⁸ the Commission had repeatedly said that internal rate structures and individual rates could properly be considered only after there had been a determination of applicable general ratemaking principles and factors, of the over-all rate level of each class of service, and of the relationships of rate levels among the various classes of service.⁹⁹ Although voluminous evidence had been presented in the *AT&T General Rate Investigation*, there had been no cross-examination on any of the fully distributed cost studies which had been submitted in the record, some studies had not yet been presented, there had been no opportunity to present rebuttal evidence, and thus the case had not yet ripened for any decision on any of the contested "threshold" issues. In this posture of the case, it

⁹⁶ FCC 68-388, 33 Fed. Reg. 5900 (1968), JA p. 172. (Emphasis added).

⁹⁷ See FCC 70-191, 35 Fed. Reg. 3949 (1970).

⁹⁸ FCC 69-842, 18 F.C.C.2d 761 (1969), JA p. 214.

⁹⁹ *Service Point Case*, FCC 66-71, 2 F.C.C.2d 359 (1968); *Sports Network Case*, FCC 66-403, 3 F.C.C.2d 618, 624 (1966), 67R-62 (1967) (Review Board); *TELPAK Case*, FCC 66-1005, 7 F.C.C.2d 30 (1966), FCC 66-1188, 6 F.C.C.2d 177 (1966); *TELPAK Sharing Case*, FCC 67-612, 32 Fed. Reg. 7643, 8 F.C.C.2d 178 (1967).

was clear that it would be completely inappropriate for any rate "adjustments" to be proffered when the proper basis for any adjustments had not yet been laid. In light of the unresolved hearing issues, manifestly further studies which might serve as the predicate for future rate changes could not be undertaken without the agreement of the parties having a right to the resolution of the issues in the *AT&T General Rate Investigation*.

The Statement of Ratemaking Principles and Factors which was formulated in the *AT&T General Rate Investigation*,¹⁰⁰ therefore, was derived after extensive discussion and refinement of each word and phrase, as the parties insisted on preserving substantial substantive and procedural rights in return for their agreeing to forego a decision on those issues in that case, and to the preparation of new cost and market studies. One of the essential components of the agreement was that AT&T was to undertake studies of long-run incremental costs (LRIC) and fully distributed costs (FDC), as a prerequisite to a decision on appropriate rate levels of specific classes of service, but, as the Commission observed, they were to be "based on methodologies to be developed"¹⁰¹ and "principles [which] require formulation".¹⁰² Accordingly, it was provided in the Statement that "interested persons will be afforded a timely opportunity to express their views with respect to the formulation of the appropriate methods."¹⁰³

For the users, such as petitioners herein, who were party intervenors in Phase I-B, it was a requisite that they have some *meaningful* participation in the development of the techniques and methodology of the studies. Obviously, the "timely opportunity to express their views" provided in the Statement was understood to be no mere formalism and empty ritual, but actual involvement in the development of the costing methodology.

¹⁰⁰ FCC 69-842, 18 F.C.C.2d 761, Appendix A (1969), JA p. 214.

¹⁰¹ 18 F.C.C.2d at 763, JA p. 216. (Emphasis added).

¹⁰² 18 F.C.C.2d at 764, JA p. 217. (Emphasis added).

¹⁰³ 18 F.C.C.2d at 767, JA p. 222.

The agreement further contemplated that the involvement was to continue through to final formulation, in providing that ¹⁰⁴

“No carrier initiated rate level increases will be filed until the new cost studies * * * have been complete and made available to the parties hereto.”

Manifestly this provision, to be meaningful, encompassed much more than the physical delivery or availability of a mass of documents on the day of filing, or a business day or two prior thereto. When new tariff filings are made, the underlying studies become promptly available for inspection to interested parties as a matter of right, dependent not one whit upon the munificence of the carrier to effect their production. Obviously it could not have been contemplated that the parties were earnestly negotiating for the bagatelle of a prior notification measurable by hours and serving no practical purpose. The clear and unmistakable import of the agreement, particularly in light of the voluminous documents involved, was necessarily that the parties under the Statement had negotiated a contractual right to have the studies submitted, assimilated, tested, probed, evaluated, discussed, and, where appropriate, modified, over the reasonable period of time necessary to complete informed as well as informal consultations with carrier and staff, before any consideration could be given to the tender of formal tariffs for statutory effectiveness.

These provisions were breached by the carrier. Instead, the parties were merely advised on several occasions that the methodology was being worked out as the studies proceeded, with only vague statements as to the methods being employed, and without describing the methods, until *after* the studies had for all practical purposes been completed. The first disclosure of the costs produced by the methodology unilaterally adopted by AT&T was not made, and the volumes of allegedly supporting data were not produced, until one or two days before the further tariff increases were filed with the Commission. There was thus never

¹⁰⁴ 18 F.C.C.2d at 768, JA p. 224.

afforded to the parties the meaningful participation for which the users had bargained in entering into the Statement.

Nor were the rights surrendered by the users in agreeing to terminate Phase I-B only formal and inconsequential, for now, after that phase has been closed out, after AT&T has completed its own cost studies and filed massive tariff increases which the Commission has permitted to become effective under an accounting, the Commission has added issues,¹⁰⁵ reviving the self-same issues of the terminated Phase I-B of the *AT&T General Rate Investigation*, which threaten to make a mockery of its determination, in accepting the Statement, that the rate issues with respect to TELPAK, TWX, and program transmission charges could then proceed with greater dispatch and effectiveness if tried in three separate proceedings.¹⁰⁶

Whatever its rights might otherwise have been to file tariffs at will in the usual situation, the carrier has here contractually modified and circumscribed its authority by an agreement to which the carrier, its customers, and the Commission's staff were parties, and which the Commission itself has accepted. It is well settled that a public utility may not be entitled to be relieved from even an improvident bargain, where it has agreed by contract to a rate which would afford it less than a fair return, unless the rates are so low as to affect adversely the public interest.¹⁰⁷ Obviously, there can be no question here of an improvident bargain adversely affecting the public interest, with the carrier admittedly earning far in excess of its authorized return. Under these circumstances, it is submitted that it was arbitrary and capricious for the Commission not to reject the tariff increases as not in compliance with the terms and intent of the prior agreement between the interested parties.

¹⁰⁵ FCC 70-191, 35 Fed. Reg. 3949 (1970).

¹⁰⁶ FCC 69-842, 18 F.C.C.2d 761, 764 (1969), JA p. 217.

¹⁰⁷ *FPC v. Sierra Power Co.*, 350 U.S. 348, 355 (1956); Nichols & Welch, *Ruling Principles of Utility Regulation, Rate of Return*, Supp. A (1964), p. 13.

IV. The Further Rate Increases Should Have Been Rejected as Showing on Their Face That They Did Not Conform With the Requirements of the Commission's Rules and Regulations To Justify Rate Increases

Section 61.33 of the Commission's Rules and Regulations requires that the carrier "give a statement showing in detail the reasons for all changes in charges or regulations and in case any such change results in increased charges, the facts upon which the carrier relies in justification thereof."¹⁰⁸ Only recently, the Chief of the Common Carrier Bureau rejected for filing, for failure to comply with this section, AT&T tariffs which would have increased the line charges for AM and FM broadcast service.¹⁰⁹

Nevertheless, the Commission permitted further TELPAK rate increases to become effective, although as recited in detail in the petition to reject,¹¹⁰ no reasons or facts were given upon which the carrier relied in justification for numerous changes, including:

- (a) The increases in telegraph/telephone equivalency, which on their face were completely unrelated to costing considerations;
- (b) The subsidization of service terminal charges below long run incremental costs, and the resulting imposition of a burden on line charges;
- (c) The failure to determine, as the true measure of long run incremental costs, the revenue-cost relationship with and without TELPAK;
- (d) The failure to measure the effect of a reduction in charges for message toll telephone service, which constitutes more than 80 per cent of the carrier's business;
- (e) The application of a linear cost function inconsistent with the cost studies being made;
- (f) The failure to apply a factor recognizing the high density characteristics of TELPAK;

¹⁰⁸ 47 C.F.R. § 61.33.

¹⁰⁹ FCC Public Notice 37780 (September 19, 1969)

¹¹⁰ JA pp. 423-88.

- (g) The incorrect determination of the net investment level for depreciation;
- (h) The imposition of a burden on TELPAK to subsidize other services, even under AT&T's own version of fully distributed costs (FDC) studies; and
- (i) The illogical failure to propose rates which would yield the greatest revenues under its own long run incremental costing (LRIC) approach.

As an example, with respect to the telegraph/telephone equivalency (item (a) supra), modern technology permits up to 18 telegraph channels to be derived from one voice channel, but the original TELPAK tariff permitted only 12 telegraph channels to be derived from one voice channel, the interim tariff increase only 6, and the further TELPAK tariff increase only 2. Thus, while technological developments permit more telegraph channels to be derived from the same one telephone channel, AT&T has imposed higher charges by permitting fewer telegraph channels to be derived from a single voice channel.

The equivalency change, taken by itself without any consideration of the line haul and terminal rate increases, will triple the cost of telegraph service used by the members of the air transport industry. Since the air transport industry leased over 2 million miles of telegraph service under TELPAK in September, 1969, this drastic increase in its cost (approximately \$3.7 million per year) will lead to substantial restructuring of virtually every air carrier's communications requirements.¹¹¹

In the material accompanying its filing, AT&T acknowledged that "considerably more than two telegraph channels can physically be derived from a voice channel", but averred that "this is offset by the fact that terminal costs for telegraph channels are considerably higher than those for telephone."¹¹² Even though AT&T claims some indefinite offsetting difference in terminal costs, AT&T without explanation has made the adjustment not in the ter-

¹¹¹ JA pp. 687-90.

¹¹² JA p. 288.

minal costs (which consequently are being subsidized), but in assessing the line haul charges, where the equivalency in fact is 18:1, and not 2:1 as charged by the tariff. AT&T thus violates a cardinal principle, enunciated in the *Private Line Cases*, that rates which depart from cost relationships must be clearly justified:¹¹³

“Cost considerations.—Generally, we believe that the cost of providing service constitutes the most reliable criterion available for determining just, reasonable, and nondiscriminatory rates. We shall regard costs either as directly controlling in the fixing of rates herein or as reference points from which to measure the extent of any departures therefrom, based on other ratemaking considerations. Rates which depart from cost indications must be clearly warranted in order to satisfy our statutory standards of lawfulness.”

It was thus clearly arbitrary and capricious for the Commission to refuse to reject tariff increases which on their face did not comply with the requirements of the Commission's Rules and Regulations that justification for increased charges must be fully shown.

V. Refunds Under an Accounting and a Complaint for Damages Would Be Inadequate Remedies for Irreparable Injury

Although the Commission has ordered an accounting by AT&T under Section 204 of the Communications Act of 1934, as amended, it has been conceded that accounting is a completely inadequate remedy for the users here involved. Thus, in response to a petition by the railroad industry for reconsideration of the accounting order, AT&T declared in opposition:¹¹⁴

“[T]he only charges subject to refund under the Act are those previously suspended—which, in this case, are the TELPAK charges. Hence, there is no statutory basis for requiring an accounting of amounts received under other tariffs whose charges have not been increased or suspended.

“On practical grounds as well, these petitions should be denied. TELPAK sections typically form parts of

¹¹³ 34 F.C.C. 244, 297 (1961) (Emphasis added).

¹¹⁴ JA pp. 708-09. (Emphasis added).

complex and dynamically changing communications systems. * * * *These rate increases will undoubtedly impel some customers to revise their requirements and undertake extensive reconfigurations of their systems. * * * There is no practicable means of ascertaining which request for a different or additional service may be attributable to the change in the equivalency regulation.*"

The Commission similarly recognized the inadequacies of its accounting order, but suggested a complaint for damages as a supplementary remedy:¹¹⁵

"The very nature of identification of channels that are at this date affected by the change in equivalency ratios, and channels added in the future that may be affected thereby, contain sufficient questions of fact that an accounting order is not well suited to such changes. Rather, a complaint requesting damages filed by each party affected by the equivalency ratio would seem to be the most efficient way of handling the problem."

However, there is considerable question whether a complaint for reparations would be available, and in any event the procedure at best would provide only an inadequate remedy:

- a. There is no settled precedent that a complaint for damages under Section 206 of the Communications Act of 1934, as amended,¹¹⁶ will not be held to be precluded by or mutually inconsistent with an accounting under Section 204 of the Act.¹¹⁷ Section 206 may be construed to reach only tariff charges imposed *after* they have been "prohibited or *declared to be unlawful*" (Emphasis added).
- b. Section 415 of the Act imposes a one-year statute of limitations on complaints for damages.¹¹⁸
- c. Section 1.723 of the Commission's Rules and Regulations is very strict in requiring that damages be alleged with certainty and specificity.¹¹⁹

¹¹⁵ FCC 70-75, 21 F.C.C.2d 1, 6 (1970), JA p. 730. (Emphasis added).

¹¹⁶ 47 U.S.C. § 206.

¹¹⁷ 47 U.S.C. § 204.

¹¹⁸ 47 U.S.C. § 415.

¹¹⁹ 47 C.F.R. § 1.723.

d. Section 204 places the burden of proof for increased charges upon the carrier, but Section 206 would shift that burden to the carrier's customers.

e. The decision on the propriety of the further increases would appear to apply only to the issues specified and under an accounting, and a complaint for damages may have to be subsequently litigated separately.¹²⁰

f. The carriers have suggested that interest on the TELPAK increased rates, even though found to be unlawful, may be denied.¹²¹

g. In any event, the losses in service, efficiencies, and innovations can never be recaptured; no relief can be provided for the disruptions, costs, and losses in the redesigning of substitute systems grossly distorted to adapt them to a new rate structure; and injury in losses to the public to whom the TELPAK users provide service cannot be accurately measured, or adequately recompensed.

We see, therefore, that by merely pointing to the possibility of multiple and drawn-out litigation for damages, the Commission has not changed or corrected the admitted inadequacy of an accounting order in the present situation.

Where the burden of increased charges are passed on to the public (TELPAC users for the most part, in addition to the Federal and State governments, are regulated common carriers), refund provisions are particularly inadequate: "[E]xperience has shown this to be somewhat illusory in view of the trickling down process necessary to be followed, the incidental cost of which is often borne by the consumer, and in view of the transient nature of our society which often prevents refunds from reaching those to whom they are due."¹²² It is no answer to say that an accounting for the utility will afford protection to the public: "the possibility of refund does not afford sufficient protection."¹²³

¹²⁰ Cf. *The Carterfone Case*, 68-661, 13 F.C.C.2d 420 (1968), FCC 68-922, 14 F.C.C.2d 571 (1968).

¹²¹ JA pp. 624, 640-41.

¹²² *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 154-55 (1962).

¹²³ *FPC v. Hunt*, 376 U.S. 515, 523 (1964). Cf. *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 228 (1965); *City of Chicago v. FPC*, 128 U.S. App. D.C. 107, 122, 385 F.2d 629, 644 (1967), cert. den. 390 U.S. 945 (1968).

VI. The Commission Had Plenary Power and an Affirmative Responsibility To Reject the Further Rate Increases

The plenary power of a Federal agency to prohibit the pyramiding of rate increases, even where its statutory authority includes the power to suspend rates for a limited period, is well established. In upholding the authority of the Federal Power Commission to impose a moratorium on proposed rate increases, the Supreme Court said in the *Permian Basin Area Rate Cases*:¹²⁴

“Certain of the producers * * * reason that § 4(d) creates an unrestricted right to file rate changes, and that such changes may, under § 4(e), be suspended for a period no longer than five months. If this construction were accepted, it would follow that area proceedings would terminate in rate limitations that could be disregarded by producers five months after their promulgation. * * *

“ * * * [T]his Court has already declined to find in § 4(d) or § 4(e) an ‘*invincible right to raise prices subject only to a six month delay and refund liability.*’ ”

In *FPC v. Texaco, Inc.*,¹²⁵ the Supreme Court similarly recognized that an administrative agency, despite suspension limitations, may cut off successive rate increases at the threshold.

The power of the agency to impose a moratorium was “unquestionably set at rest”¹²⁶ in *United Gas Improvement Co. v. Callery Properties, Inc.*,¹²⁷ where the Supreme Court upheld the “ample power” of a Commission to keep a price level relatively constant pending determination of the just and reasonable rate for consumer protection during the interim period. Congress, the Supreme Court said in *FPC v. Hunt*,¹²⁸ could not have intended any such “incongruous result” as to permit the Commission’s power to review rates to be nullified by subsequent independent action by the filing of new rates by the regulated entity.

¹²⁴ 390 U.S. 747, 779 (1968) (Emphasis added).

¹²⁵ 377 U.S. 33, 42-44 (1964).

¹²⁶ *Continental Oil Co. v. FPC*, 373 F.2d 510, 527 (5th Cir. 1967), cert. den. 491 U.S. 917 (1968).

¹²⁷ 382 U.S. 223, 228 (1965).

¹²⁸ 376 U.S. 515, 522, 523-24 (1964).

This is not an encroachment upon the privileges of the company to file rates, but is designed to protect the consuming public while the justness and reasonableness of prices is being determined.¹²⁹ To the extent that *Willmut Gas & Oil Company v. FPC* indicated the contrary,¹³⁰ that decision is no longer the law, having been superseded by more recent decisions of the Supreme Court such as the *Texaco* case¹³¹ (where the lower Court had relied upon the *Willmut* case approach),¹³² the *Callery* case (where the Commission had treated such cases as "judicial aberrations"),¹³³ and the *Permian Basin Area Rate Cases*.¹³⁴

In the "*Ingot Molds*" Case, the Supreme Court upheld the authority of another agency, the Interstate Commerce Commission, to hold the line on existing rates while it was making "a broad-scale examination of the whole question of the cost standards to be used", precisely the same kind of examination which was going on in Phase I-B of Docket 16258 and has now been revived in Docket 18128. In doing so, it reiterated the principle of the *Permian Basin* case that "the legislative discretion implied in the rate making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself."¹³⁵

¹²⁹ *Atlantic Refining Co. v. Public Service Com'n*, 360 U.S. 378, 391-92 (1959).

¹³⁰ 111 U.S. App. D.C. 49, 294 F.2d 245 (1961), cert. den. 368 U.S. 972 (1962), reh. den. 369 U.S. 813 (1962). It may be noted that even the *Willmut* case recognized that the power of a regulated company to change rates may be controlled by contract. 111 U.S. App. D.C. at 52, 294 F.2d at 248.

¹³¹ *FPC v. Texaco, Inc.*, 377 U.S. 33 (1964).

¹³² 317 F.2d 796, 805 fn. 28 (10th Cir. 1963).

¹³³ See 335 F.2d 1004, 1017 (5th Cir. 1964). The Fifth Circuit had disagreed with the Commission's claim of the "necessity for, and the existence of, a power to take whatever action, impose whatever conditions to assure that 'excessively higher rates are absolutely prevented from being charged.'" 335 F.2d at 1018. The Supreme Court rejected the narrower construction by the Fifth Circuit of the Commission's power. Even the separate opinion in the Supreme Court, concurring in part, dissenting in part, disagreed with the contention that the statute "must be read to bestow on producers an invincible right to raise prices subject only to a six-month delay and refund liability." 382 U.S. at 232.

¹³⁴ 390 U.S. 747 (1968).

¹³⁵ *American Commercial Lines, Inc. v. Louisville & N.E.R. Co.*, 392 U.S. 571, 590, 592 (1968).

In recent cases the Courts have also emphasized, in the context of CATV regulation, the broad regulatory powers of the respondent Federal Communications Commission to effectuate its statutory responsibilities, and to provide interim relief pending hearing determinations. In *United States v. Southwestern Cable Co.*, the Supreme Court declared:¹³⁶

"The Commission has acknowledged that, in the area of rapid and significant change, there may be situations in which its generalized regulations are inadequate, and special or additional forms of relief are imperative. It has found that the present case may prove to be such a situation, and that the public interest demands 'interim relief . . . limiting further expansion,' pending hearings to determine the appropriate Commission action. Such orders do not exceed the Commission's authority.* * * Thus, the Commission has been explicitly authorized to issue 'such orders, not inconsistent with this [Act], as may be necessary in the execution of its function.' 47 U.S.C. § 154(i). See also 47 U.S.C. § 303(r). In these circumstances, we hold that the Commission's order limiting further expansion of respondents' service pending appropriate hearings did not exceed or abuse its authority under the Communications Act."

In *General Telephone Co. of Cal. v. FCC*, this Court further extended the implicit regulatory authority of the Commission in aid of its explicit powers, rejecting an argument that a provision for one method of enforcement was exclusive and precluded other available remedies, and declared that this contention "also runs contrary to the reasoning of recent decisions emphasizing the flexibility which an expert regulatory agency must possess if it is to keep pace with a still burgeoning industry."¹³⁷

In broadcast matters, the respondent Commission itself, despite statutory directions that it "shall" either grant an application or formally designate it for hearing,¹³⁸

¹³⁶ 392 U.S. 157, 177, 180-81 (1968).

¹³⁷ 413 F.2d 391, 409 (U.S. App. D.C. 1969), cert. den. 396 U.S. 888 (1969).

¹³⁸ Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. § 309.

has not hesitated to impose a "freeze" on broadcast license applications, without express statutory authority, pending the resolution of general proceedings relating to frequency allocations or channel assignments.¹³⁹

In common carrier rate making, although the Commission at one time indicated its view that its authority was limited to a suspension of tariff increases to a maximum of ninety days,¹⁴⁰ in recent months it has considerably modified its position. In a proceeding involving the lawfulness of Western Union tariffs, after the carrier filed a series of increases following the commencement of the hearing, the Commission issued an order forbidding Western Union from making any further changes in rates during the pendency of the proceedings except upon special permission from the Commission upon good cause shown.¹⁴¹ The Commission has also instituted rulemaking proceedings to determine whether to increase the statutory requirement of 30 days' notice of tariff changes by a general agency rule.¹⁴² In the orders before this Court for review, the Commission declared that it could "find no reason to disturb" an earlier conclusion¹⁴³ that it cannot reschedule the effectiveness of rates under Sections 4(i) and 303(r) of the Communications Act,¹⁴⁴ or the *Southwestern Cable* case,¹⁴⁵ because of the 90-day statutory suspension limitation,¹⁴⁶ but it also declared that "we are not deciding at this time the extent of our authority to grant the kind of relief petitioners request".¹⁴⁷

¹³⁹ *Interim Criteria to Govern Acceptance of Standard Broadcast Applications*, 23 R.R. 1545 (1962), 24 R.R. 1540 (1962); *Kessler v. FCC*, 117 U.S. App. D.C. 130, 326 F.2d 673, 681 (1963); *Harvey Radio Laboratories, Inc. v. United States*, 110 U.S. App. D.C. 81, 83, 289 F.2d 458, 460 (1961); *Harbenito Broadcasting Co. v. FCC*, 94 U.S. App. D.C. 329, 218 F.2d 28 (1954); *Vindicator Printing Co.*, 8 R.R. 328 (1952); cf. *American Broadcasting Co. v. FCC*, 89 U.S. App. D.C. 289, 191 F.2d 492 (1951).

¹⁴⁰ *TELPAC-Private Line Case*, FCC 68-872, 14 F.C.C.2d 564 (1968).

¹⁴¹ FCC 69-1307 (1969).

¹⁴² *Amendment of Part 61 of Rules*, Docket No. 18703, FCC 69-1140, 34 Fed. Reg. 17116 (1969).

¹⁴³ *TELPAC-Private Line Case*, FCC 68-872, 14 F.C.C.2d 564 (1968).

¹⁴⁴ 47 U.S.C. §§ 154(i), 303(r).

¹⁴⁵ *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

¹⁴⁶ Section 204 of the Communications Act of 1934, as amended, 47 U.S.C. § 204.

¹⁴⁷ *TELPAC-Private Line Case*, FCC 69-1196, 20 F.C.C.2d 383, 386 (1969), JA p. 562, FCC 70-75, 21 F.C.C.2d 1, 4 fn. 8 (1970), JA p. 728.

The power of the Commission to grant the necessary relief appropriate under the circumstances is reflected, however, not only in the cases cited, but in Section 4(i) of the Communications Act, which authorizes the Commission "to perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions";¹⁴⁸ in Section 4(j) of the Act, which authorizes the Commission "to conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice";¹⁴⁹ and in Section 203(b) of the Act, which provides that the Commission may, "in its discretion and for good cause shown, modify the requirements" as to statutory suspensions "in particular instances or by a general order applicable to special circumstances or conditions."¹⁵⁰ The Commission's authority to reject further rate increases, under these special and extraordinary circumstances, is thus clearly established, and its failure to reject the pyramiding of increases *pendente lite* was arbitrary, capricious, and an abuse of discretion.

VII. This Court Has Jurisdiction To Review the Arbitrary and Capricious Refusal of the Commission To Reject the Further Rate Increases, and To Afford Appropriate Relief

It is recognized that, under the *Arrow Transportation* doctrine, a court sitting in equity will decline to suspend rates when a Federal regulatory commission has refused to do so, or to set aside an interim suspension order of the Commission, or to suspend a rate change beyond the statutory period, because the suspension provisions of the statute limit and define the extent of the suspension power.¹⁵¹ Distinguishing the authority of an *appellate* court to issue stay orders incident to its power to *review* agency action,¹⁵² the Supreme Court held that the courts have no jurisdic-

¹⁴⁸ 47 U.S.C. § 154(i).

¹⁴⁹ 47 U.S.C. § 154(j).

¹⁵⁰ 47 U.S.C. § 203(b).

¹⁵¹ *Arrow Transportation Co. v. Southern R. Co.*, 372 U.S. 658 (1963).

¹⁵² 372 U.S. at 671 fn. 22.

tion as a court of equity to extend a maximum statutory period beyond the limits prescribed by statute.¹⁵³

This is not a suspension case. Petitioners do not invoke the aid of this Court, sitting in equity, to modify or require the modification of a statutory suspension period; the relief they seek is independent of the terms of the statutory provisions governing suspension by this Commission, Section 204 of the Communications Act of 1934, as amended.¹⁵⁴

Instead, this is a petition to this Court, under its regular appellate powers, to review action and inaction of a Federal regulatory agency which is unlawful, arbitrary, capricious, and an abuse of discretion. The Commission's orders complained of are final orders with respect to the denial of petitions to reject, and the irreparable injury which follows as a direct legal consequence of its action. As persons aggrieved, petitioners sue under Section 402(a) of the Communications Act of 1934, as amended,¹⁵⁵ and Sections 2 and 4 of the Judicial Review Act of 1950, as revised,¹⁵⁶ to enjoin, set aside, and annul the Commission's orders denying the petitions to reject. As persons suffering legal wrong because of agency action and inaction, and adversely affected and aggrieved thereby, they appeal under Section 10(e) of the Administrative Procedure Act of 1946, as revised,¹⁵⁷ for the Court "to compel agency action unlawfully withheld or unreasonably delayed," and to hold unlawful and set aside agency action which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and "without observance of procedure required by law."

"[A]lthough some older precedents suggest broadly that an administrative ruling is not reviewable until it imposes an obligation or subjects the plaintiff to some civil or crimi-

¹⁵³ Cf. *Movers' & Warehousemen's Ass'n v. U. S.*, 227 F. Supp. 249, 251 (D.C. D.C. 1964) (three-judge Court) (a Court lacks jurisdiction to grant an injunction to vacate an order of suspension or to enter an order suspending contested tariffs).

¹⁵⁴ 47 U.S.C. § 204.

¹⁵⁵ 47 U.S.C. § 402(a).

¹⁵⁶ 28 U.S.C. §§ 2342, 2344.

¹⁵⁷ 5 U.S.C. § 796.

nal liability, * * * there has been a growing recognition that the timeliness of review depends on a broader concept of the substantiality of present or imminent harm."¹⁵⁸ The administrative orders here are reviewable because they have imposed obligations upon TELPAK users to comply with revised tariff schedules (which have the binding effect of statutes controlling their legal rights),¹⁵⁹ denied the right of TELPAK users to have the tariff increases rejected as invalid on their face and in violation of contractual agreement, and served to fix the legal relationships between carrier and users.¹⁶⁰ The Commission's action is reviewable because "it operates to control the business affairs" of petitioners, while at the same time a petitioner "cannot cogently plan its present or future operations" because of the uncertainties of the further rate increases.¹⁶¹ The cause is justiciable now because of its own special circumstances, including the appropriateness of the issues for decision now by this Court and the actual hardship to the litigants of denying them the relief sought.¹⁶² Here the Commission's orders both impose the obligation on TELPAK users to suffer the liability of large rate increases, and create the immediate consequences of severe additional costs and severe cut-backs and disruptions in communications service. The general rule on administrative finality "does not establish an inflexible standard requiring a conventional hearing and resulting in findings supported by evidence as a condition to review. * * * An order of an administrative body is reviewable when action which is taken in advance of hearings or adjudication results in the setting of legal consequences."¹⁶³

Petitioners do not address themselves to a power to suspend, the subject of the *Arrow Transportation* case, but

¹⁵⁸ *Toilet Goods Association v. Gardner*, 360 F.2d 677, 685 (2nd Cir. 1966).

¹⁵⁹ *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156, 163 (1922).

¹⁶⁰ Cf. *Chicago & So. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 112-13 (1948).

¹⁶¹ Cf. *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 199-200 (1969).

¹⁶² Cf. *Poe v. Ullman*, 367 U.S. 497, 508-09 (1961).

¹⁶³ *Cities Service Gas Company v. FPC*, 255 F.2d 860, 863 (10th Cir. 1958).

to a responsibility to reject. Petitioners do not claim merely that the rate increases were unreasonably high or discriminatory, or that the error was the failure of the Commission to suspend beyond the statutory period, but instead that this Court can and should void the Commission's arbitrary and capricious order because the Commission in effect has abdicated its authority and duty to reject altogether the further TELPAK rate increases here involved.

Under the test of *Isbrandtsen Co. v. United States*, this case is ripe for review. An agency's refusal to act is reviewable where consequences of finality through irreparable injury attach to the order, even though the agency action relates to rate making, and hearings have not been conducted or concluded:¹⁶⁴

"This court has jurisdiction to review only final orders of the Board. Whether or not the statutory requirements of finality are satisfied in any given case depends not upon the label affixed to its action by the administrative agency but rather upon a realistic appraisal of the consequences of such action. '*The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control.*' * * * Under this test, a final order need not necessarily be the very last order."

Similarly, in *Phillips Petroleum Company v. FPC*, where prior approval of the agency is not required, and rates may become effective subject to a suspension period, the Tenth Circuit stated:¹⁶⁵

"The orders sought to be reviewed here do not deal with the merits of the proceedings before the Com-

¹⁶⁴ 93 U.S. App. D.C. 293, 297-98, 311 F.2d 51, 55-56 (1954), cert. den. sub nom. *Japan-Atlantic and Gulf Conference v. United States*, and *FMB v. United States*, 347 U.S. 990 (1954) (Emphasis added).

¹⁶⁵ 227 F.2d 470, 475 (10th Cir. 1955), cert. den. 350 U.S. 1005 (1956) (Emphasis added).

mission in the sense that they were entered upon evidence concerning the reasonableness of the rates. *They do not purport to finally determine Phillips' wholesale rates.* That matter is left to a conventional hearing in these proceedings. *But the orders do purport to establish with finality the wholesale rates which Phillips was authorized to charge * * * until changed by order of the Commission pursuant to hearing."*

In *Amarillo-Borger Express v. United States*, a three-judge Court voided an order of the Interstate Commerce Commission because it vacated an earlier suspension of proposed rates and permitted them to become effective without stating adequate reasons therefor, and said:¹⁶⁶

"We are equally of the clear opinion that Complainants have the right to challenge and the court has the power to nullify action so illegal and having such immediate and irreparable consequences. * * * Complainants may succeed in the investigative process soon to commence, but grinding, as it must, slowly through inevitable judicial review, the motor carriers will have no relief for the traffic which they lost, diverted to rails, during this long period of time."

The Federal Courts have consistently reviewed the orders of various agencies, whether *rejecting* or *refusing to reject* tariff filings.¹⁶⁷ In this regard, Section 10(e) of the Administrative Procedure Act reaches "agency action unlawfully withheld or unreasonably delayed" as well as affirma-

¹⁶⁶ 138 F. Supp. 411, 420 (N.D. Tex. 1956) (three-judge Court), judgment vacated as moot, 352 U.S. 1028 (1957). But see *Long Island R.R. v. U. S.*, 193 F. Supp. 795, 798 (E.D.N.Y. 1961) (three-judge Court).

¹⁶⁷ See e.g., *United Gas Co. v. Mobile Gas Corp.*, 215 F.2d 883 (3rd Cir. 1954), affirmed 350 U.S. 332 (1956) (FPC required to reject new rate increases not in accord with contract); *Memphis Light, Gas and Water Division v. FPC*, 102 U.S. App. D.C. 77, 79-80, 250 F.2d 402, 404-05 (1957), reversed, 358 U.S. 103 (1958) (same; reversed on ground that carrier here not so contractually bound, but not on reviewability); *Tyler Gas Service Company v. FPC*, 101 U.S. App. D.C. 184, 247 F.2d 590 (1957), cert. den. 355 U.S. 895 (1957) (same); *Superior Oil Company v. FPC*, 378 F.2d 510 (5th Cir. 1967), cert. den. 391 U.S. 917 (1968); *American Airlines, Inc. v. CAB*, 123 U.S. App. D.C. 310, 359 F.2d 624 (1966), cert. den. 385 U.S. 843 (1966) (review of tariff filing rejected as contrary to CAB policy); *Flying Tiger Line v. CAB*, 92 U.S. App. D.C. 260, 204 F.2d 404 (1953) (review of CAB order directing an air cargo carrier to cancel an unauthorized passenger charter tariff); *W. J. Dillner Transfer Co. v. U. S.*, 214 F. Supp. 941 (W.D. Pa. 1963) (three-judge Court) (review of ICC order rejecting a motor carrier tariff).

tive unlawful agency actions.¹⁶⁸ Appropriate direction to the Commission need not take the form of a writ of mandamus, and the Court may be "certain * * * in light of [its] opinion"¹⁶⁹ that upon remand the Commission will take whatever measures are necessary and appropriate to effect rescission of the further tariff increases which have been permitted to become effective.

CONCLUSION

Under all of the unusual circumstances of this case, including strong indications of apparent prejudgment of underlying unresolved issues, the Commission's failure to reject the further TELPAK rate increases was unlawful, arbitrary, capricious, and an abuse of discretion. This cause should be reversed and remanded to the Commission for further proceedings in order that the Commission may set aside so much of its orders here complained of, and take all measures necessary and appropriate, to rescind and nullify the further TELPAK rate increases here involved.

Respectfully submitted,

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¹⁶⁸ 5 U.S.C. § 706.

¹⁶⁹ See, e.g., *Folkways Broadcasting Co. v. FCC*, 126 U.S. App. D.C. 393, 395, 379 F.2d 447, 449 (1967).

APPENDIX A

STATUTES AND RULES INVOLVED

Communications Act of 1934, 48 Stat. 1064, as amended. §§ 151 et seq.:

Section 1, 47 U.S.C. § 151:

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

Section 4(i), (j), 47 U.S.C. § 154(i), (j):

(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

• • • • •

(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. • • • •

Section 201(b), 47 U.S.C. § 201(b):

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful * * * •.

Section 202(a), 47 U.S.C. § 202(a):

(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

Section 203(b), (d), 47 U.S.C. § 203 (b), (d):

(b) No change shall be made in the charges, classification, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions.

• • • • •

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

Section 204, 47 U.S.C. § 204:

Whenever there is filed with Commission any new charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative, enter upon a hearing, concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, but not for a longer period than three months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference

thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed change of charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased charges as by its decision shall be found not justified. At any hearing involving a charge increased, or sought to be increased, after the organization of the Commission, the burden of proof to show that the increased charge, or proposed increased charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Section 206, 47 U.S.C. § 206:

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Section 207, 47 U.S.C. § 207:

Any person claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district court of the United States of competent jurisdiction; but such

person shall not have the right to pursue both such remedies.

Section 303(r), 47 U.S.C. § 303(r):

Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—

• • • • •
 (r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act • • • • •

Section 402(a), 47 U.S.C. § 402(a):

(a) Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in Public Law 901, Eighty-first Congress, approved December 29, 1950.

Section 415(b), (c), (d), 47 U.S.C. § 405(b), (c), (d):

(b) All complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within one year from the time the cause of action accrues, and not after, subject to subsection (d) of this section.

(c) For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers within one year from the time the cause of action accrues, and not after, subject to subsection (d) of this section, except that if claim for the overcharge has been presented in writing to the carrier within the one-year period of limitation said period shall be extended to include one year from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

(d) If on or before expiration of the period of limitation in subsection (b) or (c) a carrier begins action under subsection (a) for recovery of lawful charges in respect of the same service, or, without beginning action, collects charges in respect of that service, said

period of limitation shall be extended to include ninety days from the time such action is begun or such charges are collected by the carrier.

Judicial Review Act of 1950, 64 Stat. 1129, as revised, 80 Stat. 622, 28 U.S.C. §§ 2341 et seq.:

Section 2, 28 U.S.C. § 2342:

The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47 * * * *.

Section 4, 28 U.S.C. § 2344:

* * * Any party aggrieved by the final order may within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies.
* * *

Administrative Procedure Act of 1946, 60 Stat. 237, as revised, 80 Stat. 381, 5 U.S.C. §§ 551 et seq.:

Section 2, 5 U.S.C. § 551:

For the purpose of this subchapter—
* * *

(13) “agency action” includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

Section 10(a), 5 U.S.C. § 702:

(a) A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

Section 10(e), 5 U.S.C. § 706:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Rules and Regulations of the Federal Communications Commission:

Section 1.723, 47 C.F.R. § 1.723:

(a) In case recovery of damages is sought, the complaint shall contain appropriate allegations showing such data as will serve to identify, with reasonable certainty, the communications, transmissions, or other services for which recovery is sought, and shall state:

(1) That the complainant makes claim for damages;

(2) The name and address of each individual claimant asking damages;

(3) The name and address of the defendant against which the claim is made;

(4) The communications, transmissions, or other services rendered, the charge applied thereto, the date when charges were paid, by whom paid, and by whom borne;

(5) The period of time within which, or the specific dates when the communications, transmissions, or other services were rendered;

(6) The points of origin and reception of the communications or transmissions, and if the damages sought to be recovered are for services other than communications or transmissions, then the allegations of the complaint shall state the nature and extent of such services, the date or dates when rendered, when paid for, and by whom borne;

(7) The nature and amount of injury sustained by each claimant;

(8) Separately, the damages with respect to each communication, transmission, or other service for which recovery is sought;

(9) If damages are sought on behalf of others than the complainant, in what capacity or by what authority complaint is made in their behalf; and

(10) That suit has not been filed in any court on the basis of the same cause of action.

(b) Damages will not be awarded upon a complaint unless specifically requested. Damages may be awarded, however, upon a supplemental complaint based upon the finding of the Commission in the original proceeding.

Section 61.33, 47 C.F.R. § 61.33:

All publications filed with the Commission shall be accompanied by a letter of transmittal * * * *. (Here give a statement showing in detail the reasons for all changes in charges or regulations and in case any such change results in increased charges, the facts upon which the carrier relies in justification thereof.)

APPENDIX B*

CHRONOLOGY OF PRINCIPAL EVENTS

- March 18, 1964 In the tentative decision in the original *TELPAK Case*, Docket No. 14251, the Commission found that there "is *apparent justification for TELPAK C and D classifications in terms of meeting competition from private microwave systems* having channel capacities comparable to those offered by such TELPAK classifications," but was "unable to determine on this record that the rates for TELPAK C and D classifications are compensatory in relation to the cost of furnishing the services offered thereunder." 38 F.C.C. 370, 395.
- Dec. 24, 1964 In the final decision, the Commission affirmed its tentative decision, and ordered that the record be reopened to consider "*whether or not the existing rates for TELPAK C and D are compensatory*" on the basis of additional data from cost studies being conducted by AT&T of its various services. 37 F.C.C. 1111, 1117-18.
- Sept. 10, 1965 AT&T presented in the record in the *Domestic Telegraph Investigation*, Docket No. 14650, the results of a Seven-Way Cost Study, setting forth for the 12 months ending August, 1964, based on a fully-allocated cost procedure disputed in principle and in methodology, the investment expenses, and revenues associated with each of seven different classes of communications service comprising Bell's total interstate operations, together with AT&T's expressed reservations and limitations. The material was dumped into the record as an AT&T response to a staff request, without being tested by cross-examination.

* Filed as Appendix A to "Petition to Reject, or Require or Secure Withdrawal of, Further TELPAK Rate Increases, and Request for Oral Argument," by Airline Industry Parties, October 10, 1969, JA pp. 475-87.

- Oct. 27, 1965 In large part, as a result of the Seven-Way Cost Study, the Commission instituted the *AT&T General Rate Investigation*, Docket No. 16258, to determine AT&T's revenue requirements (including rate of return) and *whether AT&T's charges for its various classes of service are just and reasonable*. FCC 65-959, 2 F.C.C. 2d 871.
- Dec. 22, 1965 The *AT&T General Rate Investigation* was divided into two phases. Phase I was to consider respondents' total interstate revenue requirements, and the *relevant rate-making principles to control in the distribution of revenue requirements among the various classes of service*. FCC 65-1143, 2 F.C.C.2d 142.
- April 7, 1966 A letter from the FCC Staff's Managing Counsel in Docket No. 16258 to AT&T's counsel reduced to writing their understanding that AT&T *would* make witnesses available to describe the procedures and methods of the Seven-Way Cost Study, and *would* prepare a revised version to give a "broad-brush" updating to reflect 1965 operating results.
- April 29, 1966 The Commission's Telephone and Telegraph Committees issued their report in the *Domestic Telegraph Investigation*, Docket No. 14650, summarizing the results of the Seven-Way Cost Study at pp. 200-04, without the Study's validity or applicability, if any, to particular rates or rate levels having been tested or subjected to cross-examination in the proceeding, and without any adjudication of the underlying questions which in the meanwhile had been put in issue in Docket No. 16258.
- July 28, 1966 The Seven-Way Cost Study was dumped into the record in the *AT&T General Rate Investigation*, Docket No. 16258, by renumbering AT&T's Exhibits 81-88 in

Docket No. 14650 as FCC Staff Exhibits 1-8 in Docket No. 16258, without an opportunity for cross-examination or rebuttal.

Sept. 15, 1966

In *American Trucking Associations v. FCC*, 377 F.2d 121, cert. den. 386 U.S. 943, the United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's decision in the *TELPAC Case*, and noted that the compensatory issue had been remanded for further hearing because the Commission's conclusion "that TELPAK C and D rates were justified by competition * * * necessitated a determination as to whether these rates were compensatory, that is, whether they would bear their own costs or would be a burden on other customers of the Company."

Nov. 9, 1966

The Commission ordered that the *TELPAC Case* be terminated after TELPAK A and B were deleted, incorporated the TELPAK record into Docket No. 16258, and folded the undetermined, remanded compensatory issue into Docket No. 16258. FCC 66-1005, 7 F.C.C.2d 30.

Nov. 17, 1966

A "Broad-Brush Updating of Seven-Way Cost Study for the Year 1965" was distributed to the parties. It was dumped into the record of Docket No. 16258 as FCC Staff Exhibit 37 on Nov. 16, 1967, Tr. Vol. 92, p. 12615, without an opportunity for cross-examination or rebuttal.

Dec. 7, 1966

The Commission ordered in Docket No. 16258 that Phase I-A on revenue requirements and rate of return, but without rate-making principles and factors, was to be decided before further proceedings. FCC 66-1136, 5 F.C.C.2d 844.

Dec. 21, 1966

On petitions for reconsideration of its order terminating the *TELPAC Case*, the Commission stated, FCC 66-1188, 6 F.C.C.2d 177:

"The Commission, in amending its Order of October 27, 1965, in Docket No. 16258 (FCC 65-959) to include a consideration of TELPAK's C and D within that docket, *was mindful of the fact that the only remaining issue with respect to TELPAK C and D was whether the existing rates were compensatory.* This issue deals with the over-all level of earnings for the service and does not relate to a detailed analysis of the specific rates involved. Accordingly, since *Docket No. 16258* contains within it the issues of the proper rate of return and the relationships of the level of earnings of different classes of service, *it is the proper proceeding within which to determine the compensatory nature of TELPAK C and D and their relationship to the other services.*" The Commission denied petitions by the airline parties and others that the compensatory issue be resolved in Docket No. 14251.

Jan. 9, 1967

AT&T "filed" and distributed in Docket No. 16258 (but did not file as a tariff schedule) rate proposals for TELPAK C and D rate increases to \$30 for TELPAK C base capacity per airline mile, \$85 for TELPAK D base capacity per airline mile, \$35 for the first terminal, \$15 for each additional terminal, and 2 to 1 telegraph/telephone equivalency. Very summary revised cost data were also filed.

Jan. 9, 1967

Separately, under Transmittal No. 10001, AT&T filed revised tariff schedules to eliminate TELPAK A and B, change some private line telephone and

telegraph rates, and introduce Series 8000. At the request of the Commission, the effective date of the changes was postponed from May 1 to August 1, 1967.

Jan. 18, 1967

Letter from Chairman Hyde to AT&T counsel, requesting AT&T's intentions to submit a "sum of the parts" cost study as of "utmost importance" to permit the Commission on the basis of record data to evaluate the reasonableness of AT&T's rate structure.

Feb. 20, 1967

Letter from AT&T counsel to Chairman Hyde emphasizing its position that a "sum of the parts" allocation of total costs is inappropriate as a method of determining the levels of rates properly chargeable for the various classes of service.

Mar. 2, 1967

Letter from Chairman Hyde to AT&T counsel, that "regardless of what costing or rate making principles are advanced in this proceeding either by Respondents or any other party, *adequate information on a fully distributed cost basis should also be available to aid in our consideration of the other principles involved.* We wish to make it clear, therefore, that the Telephone Committee deems it essential that fully allocated costs apportioned among all services be supplied by you in order that the Commission may be able to give proper consideration to such other cost principles as you may advocate. * * * [F]ailure to provide such a study may well make difficult, if not impossible, implementation of your proposals should it be determined that the cost principles you advocate are the appropriate methods for determining rates and charges for the services you furnish.

"* * * [Y]ou are directed to prepare a *new study* similar to the 'seven-way cost

study' for introduction into this proceeding * * * [and] to make any further improvements or refinements you deem appropriate *to enhance the accuracy of the updated study.*

"* * * We wish to put you on notice that we will expect a complete study covering each of your services to which you propose to apply such costing procedures [other than on a fully allocated basis] * * *."

July 5, 1967

Commission released its interim decision and order in Phase I-A of Docket No. 16258 approving a rate of return for AT&T's interstate services in the 7 to 7.5% range, and finding that AT&T was earning a rate of return of 8.56% at the existing overall level of its interstate rates, with adjustments, requiring a reduction of \$120 million in interstate revenues to bring the level of interstate earnings appropriately within the range of reasonableness specified. FCC 67-776, 9 F.C.C.2d 30, 88, 114-16.

Sept. 14, 1967

On reconsideration, the Commission modified its interim decision in Phase I-A of Docket 16258, but reaffirmed its findings on a 7 to 7.5% rate of return, and a rate reduction requirement of \$120 million. FCC 67-1047, 9 F.C.C.2d 960.

Sept. 25, 1967

AT&T advised the Commission it would shortly file new tariffs designed to reduce interstate revenues by \$100 million in compliance with the Commission's orders. FCC Report No. 2616.

Jan. 23, 1967

In acting on a petition for clarification of issues in Docket No. 16258, the Telephone Committee stated with respect to the proposed TELPAK C and D and other proposed rate increases, FCC 68M-130:

"While we did not originally contemplate consideration of any specific

rates in this proceeding, intervening events have modified the situation. Thus, Respondents have offered evidence herein on a broad economic theory of pricing, together with a practical translation of that theory into detailed cost and market studies. Those studies, in turn, are tied to certain rate changes deemed by Respondents to be necessary in the light of their examination of rate-making principles. *Any meaningful consideration of the rate-making principles here in issue thus requires consideration of the price changes as well as the extensive cost and marketing data offered by Respondents.* Petitioners and others affected therefore have an interest in the proposed rate changes and should be provided reasonable opportunity to cross-examine with respect to these rates and to offer direct testimony with respect thereto."

March 14, 1968

Following off-the-record conferences to provide the parties an opportunity to determine whether areas of agreement existed on rate-making principles, the Hearing Examiner reported that "it was the general consensus that we were unable to agree on any matters of sufficient significance to record, or to contribute meaningfully to a resolution of this proceeding, and that the appropriate medium for achieving that end would be to resume the record presentation of evidence." FCC 68M-447.

March 27, 1968

The Commission deferred the filing of an AT&T tariff for 90 days to effect another rate reduction of \$20 million. The dissenting opinion noted that AT&T had earned about 8% in 1967 and during the first month of 1968. FCC 68-341, 12 F.C.C.2d 167.

April 10, 1968

The Commission suspended for the statutory period of 3 months to September 1, 1968, TELPAK interim rate in-

creases (TELPAC C, from \$25 to \$28; TELPAK D, from \$45 to \$60; terminals, first from \$15 to \$25, subsequent from \$5 to \$10; equivalency from 12:1 to 6:1), and instituted a hearing in a new Docket No. 18128. The Commission noted that the question as to whether the original TELPAK C and D rates were compensatory had been placed at issue in Docket No. 16258, and stated, FCC 68-388, 33 Fed. Reg. 5900:

"The Commission is cognizant of the fact that the record in Docket No. 16258 is not complete as regards TELPAK C and D, since AT&T's evidence has not yet been fully examined, and the users of service under the TELPAK tariff, a number of whom are parties intervenor to the proceeding, have not yet had the opportunity to put on their cases in opposition. Presumably, such intervenors will seek to establish that the present rates are in fact compensatory, and that competitive necessity requires their maintenance at the present level. Moreover, we are cognizant of our conclusion in the original TELPAK case that the TELPAK C and D rates were apparently justified by competitive necessity, provided, however, that they be shown to be compensatory.

"On the basis of the foregoing, and the information now before us, we are unable to determine that the charges, classifications, regulations and practices contained in the revised schedules are or will be just and reasonable or otherwise lawful. If the revised schedules are permitted to become effective, the rights and interests of the public may be adversely affected thereby."

"[I]t should clearly be understood by the TELPAK users, that, IN THE EVENT A COMPLETE HEARING RECORD INDICATES that increases in the level of TEL-

PAK rates are justified or required, or that the TELPAK classification should be eliminated, any increases occasioned thereby will become effective without delay."

May 20, 1968

AT&T's "Fully Allocated Embedded Cost Study for Bell System Interstate Services—Annualized as of Late 1967" marked for identification in Docket No. 16258 as FCC Staff Exhibit No. 48 for identification without being received in evidence or tested by cross-examination (so-called Nine-Way, X-Way, or 36-Way Cost Study).

June 26, 1968

The Commission implemented its previous order for reduction of the remaining \$20 million rate reduction. The Commission noted that AT&T has continued to enjoy earnings "well in excess of 8% on interstate operations, and that the rate of growth that has been continuing in interstate services had been sufficient to offset in large measure the effect of rate reductions as well as increased interstate revenue requirements." FCC Report No. 2935. FCC 68-667, 13 F.C.C. 2d 716.

July 10, 1968

In denying petitions for consolidation of Docket No. 18128 (TELPAC interim increases) with Docket Nos. 16258 (AT&T General Rate Investigation) and 17457 (TELPAC Sharing Case), but ordering an accounting on the TELPAK interim increases, the Commission stated, 68-711, 13 F.C.C.2d 853 (footnote omitted):

"It is our expectation that UPON COMPLETION OF THE RECORD in Phase I-B in these respects, the Commission will be in a position to prescribe appropriate principles or guidelines for the determination of the over-all revenue objectives that are to be met by Respondents in the design of each of their principal rate classifications. It is also our intention

to determine the extent to which each of the existing or proposed rate classifications accord with, or fall short of, meeting those principles and guidelines."

"Thus, with respect to Respondents' rates for TELPAK service, including those now under suspension and investigation in Docket No. 18128, we will determine in Phase I-B of Docket 16258 whether competitive or other valid considerations justify the pricing discrimination existing in the TELPAK offering; and, if so, whether Respondents' existing or proposed rates for TELPAK will make an appropriate contribution to Respondents' total interstate revenue requirements. These determinations with respect to the revenue objectives appropriate to TELPAK and other services are, in our opinion, of THRESHOLD ESSENTIALITY to a determination of the reasonableness and lawfulness of the specific rates and rate relationships within the individual rate structures. It is also our opinion that we can arrive at these threshold determinations without simultaneously resolving all other questions."

"We will, therefore, defer hearings in Docket No. 18128 concerning the internal specifics of the TELPAK rate structure until the rate principle determinations are made in Docket No. 16258 and the sharing issue is decided in Docket No. 17457."

Jan. 24, 1969

AT&T's "Description of 1964 7-Way Cost Study", "Description of the 1965 Broad-Brush Updating of the Seven-Way Cost Study", and "Description of 1967 Nine-Way Cost Study" marked for identification as FCC Exhibits 53, 54, and 55 for identification, respectively, but never received in evidence, in Docket No. 16258, and never subjected to testing by cross-examination or rebuttal evidence.

Feb. 24, 1969

The Chairman of AT&T reported that AT&T was currently earning about 8% return on its investment, and hoped to increase this to about 8½%. He expected revenues to rise at least 8% during the year (the current rate of growth was about 10% annual rate), and to maintain the company's current operating profit margin at this higher volume. AT&T's revenue had climbed 111% during the past 10 years, or double the 58% in the gross national product. Wall Street Journal.

June 23, 1969

The Chairman of AT&T announced earnings of \$1.06 per average share outstanding for the three-month period ended May 31, 1969, compared with 92 cents the year before, and 97 cents in the quarter ended February 28, 1969. Telecommunications Reports.

July 29, 1969

With the exception of a recommendation that Docket No. 17457 (the TELPAK Sharing Case) be consolidated into Docket No. 18128, the Commission approved a "Statement of Ratemaking Principles and Factors in Docket No. 16258, Phase I-B" unanimously adopted by the parties participating in Phase I-B, FCC 69-842, 18 F.C.C.2d 761. The Commission stated:

"We have reviewed the statement solely for the purpose of determining whether the implementation of the suggested procedures *might facilitate the determination of appropriate ratemaking principles* for the interstate services of the Bell System respondents, and, hence, permit a more definite and timely disposition of the issues involved in phase I-B of this docket. Accordingly, we express no opinion of the merits of the various positions advocated on the record."

"The practical difficulties of accurately measuring incremental costs in a system

as complex as the telephone industry has been recognized even by advocates of incremental costs as a floor for pricing. Criticisms, likewise, have been directed to the use of fully distributed costs for pricing purposes."

"The specific statement of principles now proposed, in our judgment, *properly recognizes the relevance of both fully distributed and incremental costs in considering appropriate rate levels of specific classes of service.*¹ We make this observation without reaching any conclusion, at this time, as to the weight, if any, that should be accorded to either or both of these factors in fixing rates for a specific service. We note, in this connection, *that the statement contemplates the submission of both fully distributed and incremental cost studies, BASED ON METHODOLOGIES TO BE DEVELOPED.* It is the thrust of the statement that effective testing of the complex economic theories of costing and pricing which have been advanced in this record, and the reconciliation of opposing, or at least partially conflicting, views of expert witnesses, can best be accomplished by relating the principles advocated to specific rate proposals. Bell has agreed that implementing studies called for by the statement, and any related rate adjustments based thereon, can be filed by October 1, 1969."

"*It is readily apparent that the techniques or methodology for developing the data needed to test and apply long-run incremental cost principles REQUIRE FORMULATION.* Implementation of the stipulation and *development of such needed data* will substantially benefit

¹ We note, of course, that each party to the agreement has reserved the right to assert the relevance of FDC, LRIC, or any other method of cost determination."

from the extensive testimony and cross-examination which occurred in docket 16258, and *will permit us to proceed to the testing of specific rate-making principles in the light of the issues in the Telpak-Private Line case (docket 18128), the new program transmission rates, and such additional issues that may arise.*"

"There would also be incorporated with docket 18128, the record of docket 14251, the Telpak case which was previously incorporated herein."

Aug. 18, 1969

In direct testimony prepared for "continuing surveillance" meetings with the Commission, AT&T projected its interstate rate of return for calendar 1969 at 8.2%. Total interstate revenues of \$5 billion, a rise of 15.2%, were projected for 1969, against an over-all increase in expenses and taxes of \$4.05 billion, a rise of 14.4%, after settlement adjustments. The rate of return for the first half of 1969 was 8.3%. Of the projected revenues, there was included a \$114 million, or 20.3% boost in private line revenues. Meanwhile, network growth and technological advances have reduced the total book costs of long lines plant per circuit mile from nearly \$60 in 1950 to \$20 in 1969, with new plant today being installed at a cost of only \$12 per circuit mile. Telecommunications Reports.

Sept. 8, 1969

In its "continuing surveillance" direct testimony, AT&T updated its estimate of 1969 interstate rate of return from 8.2% to 8.1%.

Sept. 15, 1969

At the AT&T-FCC "continuing surveillance" meetings, AT&T Vice Chairman deButts indicated that *no private line increases were included in projected revenues for 1969*, and the relative effect if there were any Telpak increases in the

fall would "appear to be quite small". AT&T Vice President Emerson forecast an increase to 8.5% quickly if the surtax were eliminated, or in 1970 or 1971 if the surtax were not considered. Common Carrier Bureau Chief Strassburg estimated on the basis of the record there would be an interstate rate of return for 1969 of 8¼%. At 8.1%, AT&T is receiving \$167 million in excess of the higher limit of its authorized rate of return.

Sept. 19, 1969

In a letter to Mrs. Bess Myerson Grant, Commissioner of the New York City Department of Consumer Affairs, Chairman Hyde stated that "if, as a result of these discussions, AT&T files any revised schedules providing for rate reductions (*the company has stated it seeks no rate increases*) for interstate telephone services, these schedules will be subject to inspection, comment or formal objection by any interested entity including your office."

Oct. 14, 1969

AT&T submitted revised projections to the Commission estimating that AT&T's 1970 rate of return could go as high as 9 per cent, assuming the economy remains at 1969 levels, with a 14.8 per cent increase in net revenues. Washington Evening Star, p. A-12.

Oct. 29, 1969

In a memorandum opinion and order (FCC 69-1196, 20 F.C.C.2d 383), released November 6, 1969, the Commission denied petitions by the Airline Industry Parties to reject further TELPAK rate increases, and ordered that the increases become effective on February 1, 1970, upon a suspension of ninety days subject to an accounting order and an investigation into the lawfulness of such rate increases in FCC Docket No. 18128.

Nov. 5, 1969

In a public notice (FCC 69-1210), the Commission announced that the Bell System would shortly submit reductions in rates which it is expected will save users of telephone service about \$150 million per year. "In addition, AT&T has previously agreed to file reductions of about \$87 million representing an offset to increases in revenues resulting from higher rates recently filed for program transmission, Telpak and teletypewriter exchange (TWX) services when the latter increases become effective."

Nov. 18, 1969

"Petition for Reconsideration Predicated Principally Upon New Facts Reflecting Basic Misconceptions and Resulting in Apparent Prejudgment" filed by Airline Industry Parties.

Dec. 19, 1969

Motion for Stay filed with the Commission by the Airline Industry Parties.

Dec. 23, 1969

In a memorandum opinion and order (FCC 69-1407) released December 31, 1969, rejecting petitions by the National Association of Regulatory Commissions (NARUC) and others to suspend or reject the telephone service (MTT) rate reductions, the Commission observed that it had only recognized in its earlier public notice that the reduced rates "will not, *in themselves*, prevent the company from achieving earnings in a range of 8.0% to 8.5%. In making the latter observation, the Commission was not indicating an acceptance or approval of earnings in this range."

Jan. 16, 1970

In a memorandum opinion and order (FCC 70-75, 21 F.C.C.2d 1) released January 19, 1970, the Commission denied petitions for reconsideration and the motion of airline parties for stay of its memorandum opinion and order adopted October 29, 1969, permitting the further TELPAK rate increases to become effective February 1, 1970, with an accounting.

Feb. 18, 1970

In a memorandum opinion and order (FCC 70-191, 35 Fed. Reg. 3949) released February 25, 1970, the Commission terminated Phase I-B of the *AT&T General Rate Investigation*, FCC Docket No. 16258, and added issues whether each of the classes of service of AT&T is just, reasonable, and nondiscriminatory to the issues in FCC Docket No. 18128 as well as to those in other proceedings.

APPENDIX C

AN APPRAISAL OF REGULATORY PRICING
POLICIES IN COMMUNICATIONS

By

KENNETH A. COX

COMMISSIONER

FEDERAL COMMUNICATIONS COMMISSION

SYMPOSIUM ON REGULATORY PRICING POLICIES

INSTITUTE OF PUBLIC UTILITIES

MICHIGAN STATE UNIVERSITY

EAST LANSING, MICHIGAN

MARCH 25, 1969

* * * * *

B. *The guidelines for pricing policy**

The general regulatory pricing policy that the FCC applied in its *TELPAK* decision was a policy that has been generally applied by many regulatory agencies. Since *TELPAK* was a pricing response to competition that Bell attempted to justify on the basis of "competitive necessity", the Commission charged Bell with the responsibility of demonstrating that the proposed greatly reduced private line charges under the *TELPAK* tariff were compensatory in relation to the cost of furnishing *TELPAK*, and that users of AT&T's other services would benefit and not be burdened by the application of the reduced charges under the *TELPAK* tariff. As general principles for guiding regulatory policy, these criteria are sound. They are intended to prevent the subsidization of one service by another and the supply of non-compensatory service that does not have special Commission approval. But they are not intended to prevent the carrier from offering service that

* [Pages 15-20; emphasis added.]

is compensatory and for which the carrier is the most efficient supplier. The difficulties lie, I believe, not so much in the general criteria that form the guideline to regulatory policy but in the implementation of the guidelines—the facts and measurements that ultimately determine the disposition of specific cases. Hence, effective regulatory policy requires adequate information on which a commission can implement its pricing guidelines. And when a carrier proposes to discriminate in its pricing practices, the burden of proof clearly lies with the carrier.

In the *TELPAC* case the Commission found the services furnished under the *TELPAC* tariff and those furnished under other private line tariffs to be “like” communications services. *TELPAC* did not change the characteristics of the service offerings, but only the charges to those who could obtain private line service under the *TELPAC* tariff. The Commission also concluded that there were no significant cost differences attributable to furnishing a number of channels to one customer under *TELPAC* as opposed to furnishing the same number of channels to several customers under the other private line tariffs. We concluded, also, that there was no justification for the *TELPAC* A and B categories in terms of competitive necessity inasmuch as the record showed that the rates for the equivalent number of channels offered under ordinary private line tariffs were reasonably competitive with the costs of private microwave systems.

With respect to the *TELPAC* C and D categories, it was concluded that there was “apparent justification” in terms of meeting competition from private microwave systems having channel capacities comparable to those offered under these *TELPAC* classifications. However, the Commission was unable to determine on the record that the rates for *TELPAC* C and D were compensatory or that they did not result in a burden being thrown on users of other services. The Commission ordered the unlawful discrimination found to exist between the *TELPAC* A and B classifications, on the one hand, and private lines on the other, to be eliminated, and in addition ordered AT&T to

submit for the record additional cost data that would enable the Commission to determine whether or not the rates for TELPAK C and D were compensatory. *I found it necessary to dissent on two aspects of the TELPAK decision: (1) deferring by nine months the requirement that the unlawful discrimination found to exist with respect to TELPAK A and B be eliminated; and (2) reopening the record for the purpose of receiving further evidence as to whether or not the rates for TELPAK C and D were compensatory.*

Having found that a discrimination which had existed for nearly four years was unlawful, *sound regulatory practice, in my view, required that the discrimination be terminated forthwith.* Regulatory pricing policies that permit such delays create opportunities for the carrier to employ illegally discriminatory pricing practices at the expense of the Commission's own public interest determinations. Had the Commission required termination of the discrimination immediately, considerably more incentive would have been provided for the prompt conclusion of the cost studies and the rate adjustments that might have been indicated. With regard to the TELPAK C and D classifications, the fact that the Commission was unable to find on the basis of the record that these reduced charges were compensatory was certainly not the fault of the Commission. Rather, the interested parties had failed to sustain the burden of proof when given ample opportunity to establish their case. If preferences and discriminations cannot be justified they should not be permitted to continue while the parties attempt to correct deficiencies in their proof. *In this instance, the Commission permitted continued favored treatment for certain large users to the presumed disadvantage of their smaller business competitors, of the other users of facilities and services of AT&T, of the competing carrier Western Union, and of those concerns interested in providing private microwave equipment in competition with the common carriers. I might observe that to this day the Commission has still been unable to reach a decision as to whether or not these TELPAK serv-*

ice classifications are compensatory and whether or not they are a burden on users of other services. Hopefully we will finally be able to reach a decision on this issue in the investigation of AT&T that is now underway. But it must be emphasized that the TELPAK discrimination has been in existence for over eight years and remains unjustified. I find fault here not with the criteria by which the Commission attempted to judge the proposed rates, but rather with the regulatory practice of permitting the carrier an inordinate amount of time to gather information upon which to attempt to justify the discrimination.

I think that the lesson of the *TELP*AK experience for regulatory pricing policies is one that nearly all regulatory commissions have experienced many times. It represents, perhaps, the most significant problem tending to thwart the implementation of effective regulatory pricing policies. *In my dissent* to portions of the *TELP*AK decision, adopted in December 1964, I expressed my concern as follows:

"I discern a very disturbing pattern in connection with all the bulk rate tariffs which have been filed in recent years. AT&T offers new services which are very attractive to large users of communications. Protests are filed by competitors who claim that the tariffs are discriminatory and will result in damage to their business. The Commission suspends the tariffs, but they go into effect at the end of the statutory 90-day period. Customers are attracted and come to rely on these services. If and when, months later, we find the tariffs to be unlawful, we are besieged by users complaining that it would be unfair to withdraw the benefits they have come to value. Some of these users are very substantial concerns whose operations no one would wish to disrupt. And where does this leave the Federal Communications Commission and the public it is charged to protect? In a very difficult position, to say the least. I think we can reverse this trend only by expediting our proceedings in such cases as much as possible, and then effectuating our conclusions at once." 37 FCC 1111, 1120.

I am happy to report that I think the FCC has taken significant strides toward the reversal of this situation over

the last four years. We expect the thorough and far-reaching investigation into the ratemaking principles and factors that will be used by the Commission for evaluating carrier pricing proposals will evolve a set of workable, implementable ratemaking standards. These standards will establish a framework of analysis that should facilitate problems of information gathering, carrier justification, and commission examination in such a manner that the regulatory process will be expedited and the quality of commission decisions will be improved. In addition, within the past few years the Common Carrier Bureau has been able to expand its in-house capability for examining pricing problems and hopes to be able to maintain continuing analyses of important ratemaking problems. Further, steps are being taken to establish an increased level of interaction between Commission staff and carrier personnel on technical matters relating to such problems as the methodologies of measuring the cost and demand characteristics of communications services, so that periodic studies important to the solution of pricing problems will be undertaken and continually updated as part of the Commission's normal information base.

We are working toward a regulatory environment in which the carrier would be able to file its full cost and demand justification with its proposed tariff changes, the Commission would be able to expedite proceedings, and regulatory decisions would be effectuated promptly. *In such an environment, Commission policies and practices relating to pricing problems will not provide incentive for the carrier to use unlawfully discriminatory and preferential rates as a means of restricting efficient and effective competition for extended periods of time.*

Relatively recent Commission decisions reducing restrictions on the use of the radio frequency spectrum for private microwave and on the requirements for interconnection will tend to make Commission policy relating to pricing practices, the classification of service offerings, and tariff restrictions more and more important to the develop-

ment of communications markets. In addition, the Commission's inquiry into the interdependence of computer and communication services and facilities [Docket No. 16979] has disclosed a concern on the part of the computer industry about the pricing policies of the communications common carriers. With demands for data communications expected to mushroom over the next decade, the potential for areas of competition between various portions of the computer-data processing industry and the communications industry becomes significant. In encouraging the efficient development of these markets, the Commission will be paying increased attention to its regulatory pricing policies and proposed changes in the tariffs of the carriers.

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BRIEF FOR AEROSPACE INDUSTRIES
ASSOCIATION OF AMERICA, INC.

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,836

AEROSPACE INDUSTRIES ASSOCIATION
OF AMERICA, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents,

AMERICAN TELEPHONE AND TELEGRAPH COMPANY and
THE WESTERN UNION TELEGRAPH COMPANY,

Intervenors.

*(Consolidated with Case Nos. 23,833, 23,839, 23,841,
23,842 and 23,843)*

Petitions to Review Orders of the
Federal Communications Commission

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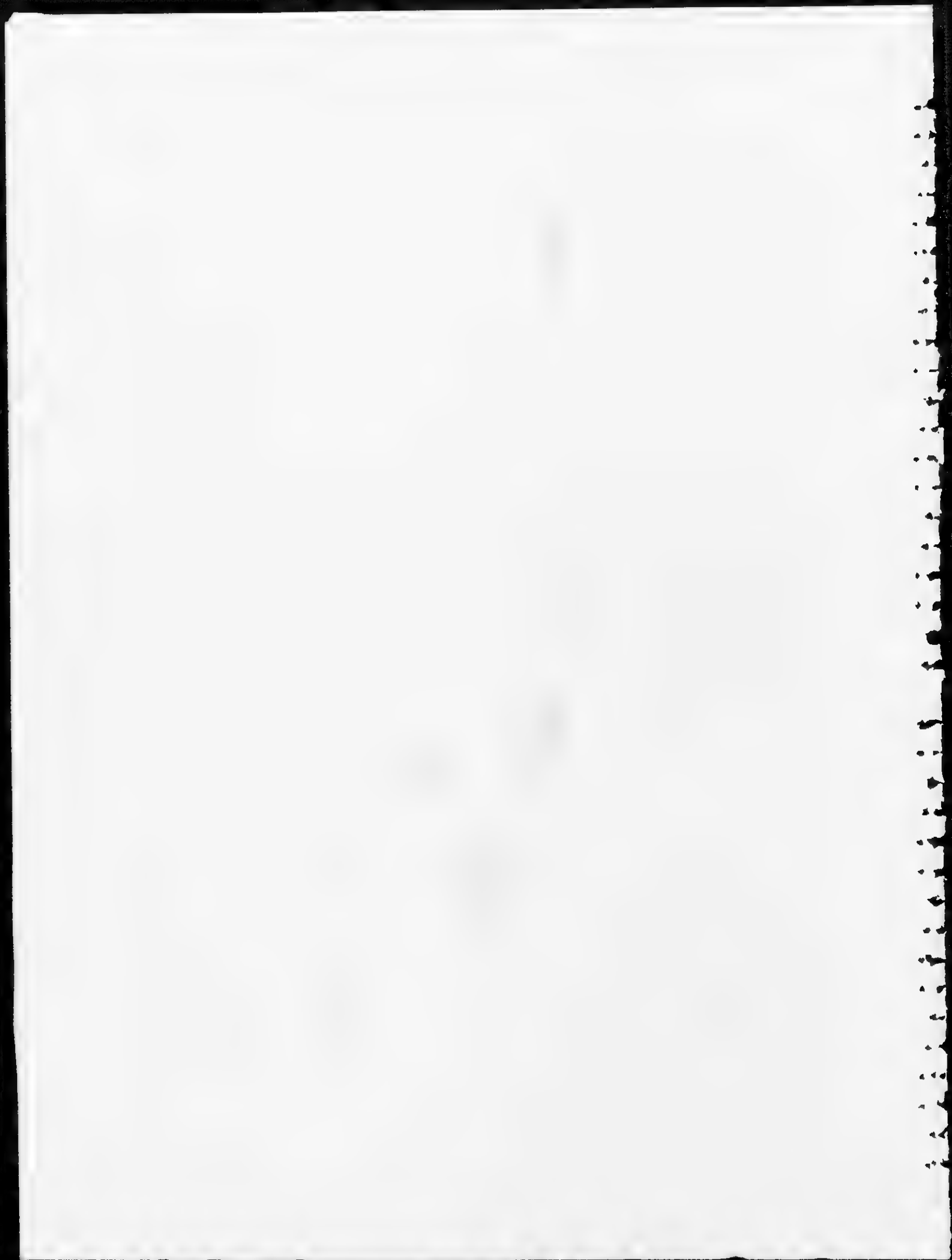


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(Consolidated with Case Nos. 23,833, 23,839, 23,841,
23,842 and 23,843)

Petitions to Review Orders of the
Federal Communications Commission

BRIEF FOR AEROSPACE INDUSTRIES
ASSOCIATION OF AMERICA, INC.

STATEMENT OF QUESTIONS PRESENTED*

The Federal Communications Commission, over the objections of the customers of the American Telephone and Telegraph Company, permitted that

*The case has not previously been before the Court except on Motions for Stay.

carrier to file, and to put into effect after a three-months' suspension, the second major increase in the rates for its Telpak service in little more than a year. The Commission did so despite the fact that, in derogation of the mandate of the Communications Act, no hearing had as yet commenced on the original rate increase and, instead of giving preference to determining the validity of the rate increases over all other matters, the hearing it then ordered on the two increases was enlarged to encompass consideration of all of the carrier's rates. Moreover, the carrier had in several material respects failed to comply with Commission approved procedures which were to precede any new rate increase filing, and, since it was already in an excess revenue position, had agreed to offset any Telpak rate increases with reductions in other rates.

In these circumstances the questions presented in this case are:

- I. Whether the Commission's failure to prevent the new rate increase from becoming effective was inconsistent with the provisions of the Communications Act.
- II. Whether the Commission possesses the statutory power to reject the new increase or otherwise prevent it from becoming effective.
- III. Whether the Court has jurisdiction to review the Commission's action and to order appropriate relief.

REFERENCES TO RULINGS

The Memorandum Opinion and Order of the Federal Communications Commission of which review is sought in this case was adopted by the Commission on October 29, 1969 and released on November 6, 1969. It is reported at 20 F.C.C. 2d 383, and set out at pp. 558-571 of the Joint Appendix.

The Memorandum Opinion and Order of the Commission denying a number of petitions for reconsideration of the Memorandum Opinion and Order of November 6, 1969, was adopted on January 16, 1970 and released on January 19, 1970. It is reported at 21 F.C.C. 2d 1 and set out at pp. 724-733 of the Joint Appendix.*

STATEMENT OF THE CASE

Telpak is a new communications service which was instituted by the American Telephone and Telegraph Company ("AT&T") in January of 1961. It provides groups of communications channels of various band widths capable of transmitting forms of electrical communication required by industrial or bulk users, *e.g.*, telephone, teletypewriter, telegraph, facsimile, data, or any combination thereof. As this Court has previously noted, Telpak was designed "[t]o meet the growing requirements of government and industry for large capacity communication facilities between specified points"¹ and to meet the actual and potential threat to AT&T presented by the expanded use of private microwave systems by large industrial users of communications. Originally, Telpak afforded potential users an option of four discrete categories of service, *i.e.*, Telpak A, B, C and D, providing for packages of 12, 24, 60 and 240 channels respectively.

Since its initiation Telpak has been the subject of substantial dispute, due principally to the fact that the effective rates per call charged for Telpak were considerably less than those in effect for other private line services provided by AT&T. The Telpak offering was initially attacked by manufacturers of private microwave equipment as well as by The Western Union Telegraph Company.

* Hereinafter the Joint Appendix is referred to as "J. A. ____."

¹ See *American Trucking Associations, Inc. v. FCC*, 126 U.S. App. D. C. 236, 377 F.2d 121, 124 (1966), *cert. denied*, 386 U.S. 943 (1967), in which this Court affirmed Commission decisions relating to Telpak. The opinions of the Court and the Commission discussed the purpose of the Telpak offering, its characteristics and the price savings involved in considerable detail.

In the administrative proceedings which followed, *Telpak Case*, 37 F.C.C. 1111 and 38 F.C.C. 370 (1964), the Commission concluded that Telpak and AT&T's other private line services are "like" communication services, that the cost of providing Telpak service had not been shown to be significantly less than those for ordinary private line service, and that the lower rates for Telpaks A and B were not justified by competitive necessity. Accordingly, it directed AT&T to file revised tariff schedules eliminating the unlawful discrimination between Telpaks A and B and the regular private line services. This AT&T did in 1967 by eliminating Telpaks A and B service.

However, the Commission found that Telpaks C and D, the services here involved, were apparently justified by competitive necessity since the record indicated that save for discounts in this range it would pay the bulk users of communications to switch to private microwave systems or microwave systems designed for them by specialized common carriers. At the same time, it found that it was unable to determine on the record then before it whether Telpaks C and D were "compensatory", *i.e.*, whether the rates charged for the service were "[h]igh enough to cover the costs attributable to the business retained or obtained . . . [so that they will] contribute to the overall economy of the operation . . ." . 37 F.C.C. at 1115-1116. The Commission thus ordered that the record be reopened in the *Telpak Case* and remanded the compensation issue for further hearing. *Id.* at 1119.

Despite its obvious significance, however, this issue has never been resolved or any hearing held thereon. Rather, in 1965, the Commission initiated a general AT&T rate investigation in Docket No. 16258, in which it sought to determine, in Phase I-B, the appropriate rate making principles and factors which should govern the relationship among the rate levels for each of AT&T's numerous services as well as whether the charges made by AT&T for each of its various classes of services made an appropriate contribution to AT&T's overall interstate revenue requirements. 2 F.C.C. 2d 142 and 2 F.C.C. 2d 871(1965). And, in 1966, the Commission terminated the original Telpak case and incorporated the still undetermined compensation issue into Phase I-B of the general rate investigation. (7 F.C.C. 2d 30 (1966); J.A. 10)

A year and a half later on March 25, 1968, while the hearings in Phase I-B were in their initial stages, the situation was further complicated by AT&T filing very substantial increases in the rates and charges for Telpaks C and D. Pursuant to Section 204 of the Communications Act, the Commission suspended the increase for three months and formally initiated a hearing into the lawfulness of that increase in Docket No. 18128. FCC Order 68-388, adopted April 12, 1968 (Unreported; J.A. 170). Section 204 expressly directs the Commission to give "preference" to hearings on such rate increases and to "decide same as speedily as possible." Nevertheless, before the hearing was actually instituted, the Commission "temporarily deferred" the proceeding (13 F.C.C. 2d 853 (1968); J.A. 176, 181), pending completion of both Phase I-B of the AT&T general rate investigation and a pending investigation in Docket No. 17457 into the lawfulness of the relevant provisions of the Telpak tariffs which limit the "sharing" of Telpak C and D groupings to government agencies, regulated industries and public utilities. See 8 F.C.C. 2d 178, 180 (1967). However, a year later in July, 1969, Phase I-B of the general rate investigation was terminated by a Commission order which remitted the question of the legality of the rates and charges for all of AT&T's private line services, including the surviving Telpaks C and D, for consideration in Docket No. 18128 and established certain procedures for the preparation of new studies prior to filing any new rate increase. (18 F.C.C. 2d 761, 765 (1969); J.A. 214).

In October, 1969, AT&T filed still another set of increases in the rates and charges for Telpaks C and D (J.A. 272). In the "Petition to Reject Further Telpak Rate Increase or For Alternative Relief" (J.A. 372) filed by Aerospace Industries Association of America, Inc. ("AIA"), and in similar petitions filed on behalf of various other Telpak users, it was contended that to permit the second round of rate increases (which AIA estimated would increase the annual communications costs of eight of its member companies alone by approximately \$3,750,000 or 26%) to go into effect pending a determination of their legality would expose Telpak users to severe economic hardship and irreparable injury. It was also asserted that any such action "would . . . be

extremely detrimental to the national security." See, "Petition of the Secretary of Defense on Behalf of All Executive Agencies of the United States to Reject or Require Withdrawal of Proposed Increases in Telpak Rates" (J.A. 355, 358). Further, it was shown that neither a three-month suspension nor an accounting order would serve to relieve this situation. Petitioners argued that, on the other hand, appropriate Commission action staying the increases from going into effect pending a hearing and final decision on their legality would impose no comparable hardship nor burden on AT&T because its own study showed that the present effective Telpak rates are compensatory, and AT&T was earning a rate of return in excess of the appropriate allowable range which had earlier been determined by the Commission. Accordingly, it was contended that, in the circumstances, the Commission was required to take appropriate action, under authority granted it by Sections 4(i) and 303(r) and 203(b) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r) and 203(b), to reject the new rate filing or defer its effectiveness pending hearing and decision.

In its Memorandum Opinion and Order of October 29, 1969 (20 F.C.C. 2d. 383, J.A. 558), which is the subject of this petition for review, the Commission held that "[i]n view of the substantial increases the company now proposes, we feel compelled to exercise the extent of our statutory authority and suspend for three months the proposed tariff schedules for Telpak." (J.A. 563). But while it recognized that the Telpak users had not yet had the opportunity offered them four years previously to present their cases seeking "to establish that the original rates were compensatory and that competitive necessity requires their maintenance . . ." *Ibid.*, and that this was the second in a series of substantial rate increases within little more than a year, it refused to grant the requests that the Commission either reject the new increase or secure the postponement of its effectuation. In this respect, while the Commission stated that it lacked power to take any additional action under either Section 4(i) or

Section 303(r) of the Act,² it expressly refrained from deciding the extent of its authority under Section 203(b). Instead it merely stated that it saw "no necessity for imposition of such extraordinary relief" since it failed "to perceive in petitioner's pleadings sufficient circumstances that would require the extraordinary remedies they seek . . ." (J.A. 561-562).

On November 5, 1969, the Commission released a Public Notice entitled, "Rates for Interstate Long Distance Calls to be Reduced" (J.A. 572). This Notice reflected the outcome of informal surveillance proceedings, from which users and other outside parties had been excluded, which had been underway between the Commission and AT&T for several months. In addition to announcing Bell's unconditional agreement to reduce rates in an amount of approximately \$150 million per year to bring its earnings more in line with an appropriate return,³ the Notice for the first time advised outside parties that "AT&T has previously agreed to file reductions of about \$87 million representing an offset to increases in revenues resulting from higher rates recently filed for program transmission, Telpak and teletypewriter exchange (TWX) services when the latter increases become effective."⁴ (*Ibid.*)

² It is not clear whether the Commission intended this disclaimer of power to extend to its power to reject deficient filings. The previous paragraph (J.A. 561) can be read as an indication that the Commission believed it had authority to reject but decided not to do so. As discussed in the text, *infra* p. 31, the Commission's authority to reject necessarily stems from Sections 4(i) and 303(r).

³ The Public Notice stated that AT&T's interstate earnings in 1969, "are expected to exceed 8%," and that AT&T forecast rate levels in 1970 under existing rates of "above 8.5%." The Commission also stated that the "rate adjustments announced today will not, in themselves, prevent the Company from achieving earnings in the aforementioned range." (*Ibid.*) While the Commission has subsequently stressed it has not determined the appropriate current rate of return for AT&T and was "not indicating an acceptance or approval of earnings in this range" (See 20 F.C.C. 2d 886, 889 (1969); J.A. 691, 694), it indicated in the Public Notice its view "in the light of current conditions, and with due regard to the proposed reductions, that interstate rates producing an earnings level which exceeds the upper limit of the 1967 range (7.5%) are not unreasonable." (J.A. 573)

⁴ On December 1, 1969, the Commission, citing Section 4(i) of the Act, issued an Order which referred to the pancaking of rate increases by Western Union and forbade that carrier from making "further changes in the rates in issue during the pendency of these proceedings . . .," except after receiving permission from the Commission. *Proposed Revisions in the Rates of The Western Union Telegraph Company*, Docket Nos. 17554, *et al.*, Memorandum Opinion and Order released December 1, 1969 (Unreported Mimeo at 3).

On January 19, 1970, the Commission issued a further Memorandum Opinion and Order denying several petitions for reconsideration of the November 6 Order as well as a number of other petitions and motions directed thereto (J.A. 724). In this new order the Commission denied contentions that its *ex parte* agreement with AT&T, requiring the latter to make offset filings reducing other rates by an amount equivalent to the Telpak increases, would prejudice the outcome of the proceeding on the Telpak increases. It also reasserted its refusal to stay the effectiveness of the Telpak increases, though in so doing it carefully refrained from reiterating its claimed lack of authority under Sections 4(i) and 303(r) (J.A. 728). Instead, it based its refusal to act upon the "fact that the Telpak users have not been caught by surprise in a situation where unexpected rate increases were proposed by the carrier" and that "therefore" the Telpak users would be sufficiently protected by the accounting order. (*Ibid.*) However, in the same Order the Commission admitted that the accounting order did not fully protect Telpak users (J.A. 730).

The present petition for review was filed in this Court on January 5, 1969 since AIA did not file a petition for reconsideration. On January 29, 1969 a panel of this Court denied Motions for Stay.⁵

⁵ On November 14, 1969, a prehearing conference in the Telpak case and two other proceedings involving private line rate increases was scheduled for January 8, 1970. At this conference AT&T agreed to file its direct case in support of the rate increases on or before April 1, 1970. Over the objection of many of the parties, the Examiners ordered that a joint hearing in the three proceedings be commenced on February 17, 1970, with examination of some exhibits which had been prepared, but not sponsored, by AT&T for the aborted general rate investigation, which the Commission had incorporated into the record in the Telpak case in its Order of July 29, 1969. A number of motions for reconsideration of this Order have been filed which are still pending before the Commission. In the meantime the February 17th hearing has been indefinitely postponed.

On February 24, 1970 the Commission, *sua sponte* released a further Memorandum Opinion and Order in the Telpak rate docket and the other proceedings involving increases in the rates for AT&T's private line services. This Order (attached hereto as Appendix B), expanded *inter alia*, the scope of all three of the proceedings involving private line service rate increases to include comprehensive consideration of the validity of all of AT&T's interstate rates.

ARGUMENT

Introduction and Summary

Section 204 of the Communications Act of 1934, as amended (47 U.S.C. 204), requires that a rate increase which has been suspended by the Commission be set for a prompt hearing in which the burden of justifying the increase is placed upon the carrier. In the present case the Commission has failed to comply with this statutory mandate with respect to two major increases in the rates charged by AT&T for its Telpak services. No hearing has as yet been commenced on either of these rate increases although the Telpak users have now been obligated to pay the increased charges under the first one for nineteen months. Instead the Commission has enmeshed its consideration of the two rate increases into a complex general investigation in which the hearing is yet to be commenced, which is intended to examine into the validity of the rates for all of AT&T's interstate services.

It is AIA's position, which the Commission has ignored, that this subordination of the special statutory procedures set out in Section 204 for expediting hearings on rate increases to a general rate investigation conducted pursuant to the provisions of Section 205 of the Act was permissible in the present circumstances only if the Commission exercised its authority under Sections 4(i), 203(b) and 303(r) of the Act to preclude any new rate increase from going into effect until the general investigatory proceeding had been concluded. The Commission's failure to take such action with respect to the latest of the Telpak increases is compounded by the fact that AT&T, in a number of material respects, failed to comply with the procedures which the Commission had prescribed as a condition precedent to any new filing.

If the carrier had sought to justify the Telpak rate increases on grounds that the increased revenues therefrom were essential to permit it to earn a minimum just and reasonable return on its investment, it might be arguable that the particular form of relief we have sought was an inappropriate exercise of

the Commission's broad authority under Section 4(i) to take action "not inconsistent with the Act." But, AT&T had not claimed the increase in Telpak rates was required to improve an inadequate revenue position. On the contrary, at the time it made the new filing it was in process of negotiating a \$150,000,000 decrease in overall revenues and had agreed to offset any Telpak increase with an equivalent reduction in other rates. In these circumstances the only action under Section 4(i) "not inconsistent with" the Act was to preclude the new increase from going into effect.

The authority of the Commission under Sections 4(i) and 303(r) to take appropriate action to carry out the objectives of the Act, despite the absence of any express authorization therefore, is now well established. Contrary to the contentions of AT&T, which conveniently ignore the absence of such general powers in the prototype Interstate Commerce Act, the authority of these sections has been held by the courts to extend to the special provisions of Title II of the Communications Act. Moreover it has been long held that the analogous rate changing provisions of the Natural Gas Act do not provide the regulated company any "invincible right to raise prices" subject only to a limited suspension and refund liability, and that a regulatory agency may totally preclude rate filings in appropriate circumstances. In addition, Section 203(b) of the Communications Act gives the Commission authority to extend, for good cause, the statutory notice period for any rate increase.

This Court possesses the jurisdiction to review the Commission's actions herein and to direct it to afford petitioners adequate relief. *Arrow Transportation Company v. Southern Railway*, 372 U.S. 658 (1963), upon which principal reliance is placed by the Commission and AT&T, holds only that the federal courts have no independent equitable powers to enjoin a rate increase. It does not oust the courts of their statutory authority to review the regulatory Commission's exercise of its powers and to take corrective action where it has acted contrary to law. Reviewing courts are understandably reluctant to supersede agency determinations to suspend or not suspend a rate increase since

such an action would normally involve a court judgment as to a rate's reasonableness without any hearing record on the matter. This reluctance is not a bar to judicial consideration of whether the agency should have acted to protect the statutory rights of a carrier's customers while the reasonableness of a rate the agency has suspended is in process of determination. Finally, the Commission's refusal to provide the Telpak users the relief they requested was a final reviewable action and the Court possesses full authority upon review to direct the Commission to undertake the actions it unlawfully refused to take.

I. THE COMMISSION'S REFUSAL TO ACT TO PRECLUDE THE NEW TELPAK RATE INCREASES FROM BECOMING EFFECTIVE DEPRIVED PETITIONERS OF THEIR STATUTORY RIGHTS.

Under normal circumstances the Commission has broad discretion as to how it will handle rate filings and the courts will not direct contrary action unless a clear abuse of discretion has been shown. In the present case, however, the Commission has adopted procedures for considering the Telpak rate increases which clearly deprived the carrier's customers of their statutory rights to a fair and prompt determination of the lawfulness of the rate increases. The denial of these rights was justifiable only if it exercised its available authority to preclude the Telpak rate increases from becoming effective prior to the completion of a general rate proceeding in which the validity of the Telpak increases is only one of the issues. Its failure to take such action is compounded by the failure of the carrier in several material respects to conform to the conditions precedent to any new Telpak rate increase filing which the Commission had expressly approved. At the same time postponing the effectiveness of the new increase could not injure the carrier in any respect, since the latest Telpak rate increases were not sought to be justified by any carrier need to increase its revenues. On the contrary, the carrier had agreed to put into effect offset reductions in other rates if and when the Telpak increases became effective.

A. The Failure to Provide the Expedited Hearing on the Rate Increases Required by Section 204.

Sections 204 and 205 of the Communications Act establish two separate procedures for Commission consideration of carrier rates. Section 205 governs Commission initiated investigations into the existing "firm" rates of a carrier, *i.e.*, those rates which are not subject to retrospective readjustment because they either have previously been prescribed by the Commission, are "initial" rates for a service or constitute rate changes which the Commission has permitted to become effective without suspension or hearing pursuant to Section 204 of the Act. Proceedings under Section 205 can lead only to prospective rate revisions by the Commission. Moreover, no burden of proof is imposed upon the carrier, and no provision is made in the statute for special expedition of the proceeding.

A quite different procedure has been established, however, for consideration of carrier initiated rate changes. In such cases, assuming the rate change is acceptable for filing, the Commission is authorized to suspend the new rate for up to three months and to "enter upon a hearing concerning the lawfulness" of the rate or service. Moreover, if, as here, an increase is involved Section 204 brings into play special additional procedures. The burden of proof of showing that the increased rate is just and reasonable is expressly placed on the carrier, and the Commission is required to "give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

In the present case, at the time the two Telpak rate increases were filed the Commission had in process a general investigation (Docket No. 16258) instituted pursuant to Section 205 of the Act to look into the appropriate rate level and structure for the entire AT&T interstate system. It also had pending a separate proceeding (Docket No. 17457), also instituted pursuant to Section 205 of the Act, looking into the lawfulness of one of the elements of the Telpak service rate design, namely, the so-called "sharing" privilege available

to a limited number of the Telpak customers. The proposed Telpak rate increases were sought to be justified by AT&T on bases wholly independent of these two proceedings, and quite independent of the proper rate level for any other service. Nevertheless the Commission, instead of following the statutory mandate to give the hearings on the rate increases "preference over all other matters pending before it," first indefinitely deferred the hearing on the rate increase pending completion of the two other Dockets, and then, over a year later, consolidated the Section 204 proceeding into a general Section 205 investigatory proceeding originally involving other "firm" private line services, and since that date expanded to include all of AT&T's interstate services. (See pp. 5-6, 8 n. 5, *supra*.)

It is and has been AIA's position that this deliberate refusal on the part of the Commission to afford the Telpak users the prompt hearing they were entitled to was in violation of Section 204 unless the Commission simultaneously exercised the authority it possesses under other sections of the Act, to reject the Telpak rate increases or postpone their effectiveness until *after* the broader inquiries, to which the Commission had chosen to subordinate the rate increase hearings, had been completed. And, as we shall show, exercise of such authority to afford the Telpak users the protection they otherwise would be unlawfully deprived of, does not here operate to prevent the carrier from securing an adequate return on its jurisdictional investment. The increases are not predicated upon any such need and, in view of the *ex parte* agreement between AT&T and the Commission to offset any Telpak increases by decreases in other services, no benefit to the carrier could be secured by putting the new increase into effect at this time.

The original Commission investigation into the Telpak service was conducted under Section 205 of the Act since the issue was the propriety of the existing firm rates for the service, then comprising Telpaks A, B, C and D. In its original decision, 37 F.C.C. 1111 (1964), the Commission, after a full hearing, concluded that while Telpak service was a "like service" to the regular

private line services offered by the carrier, *Id.* at 1113, and that the volume rate discounts involved in the Telpak offerings had not been shown to be cost justified, "[t]here is apparent justification for Telpak C and D classifications in terms of meeting competition from private microwave systems" *Id.* at 1118. However, the Commission concluded that the record before it did not permit a determination of whether Telpaks C and D were "compensatory" — *i.e.*, whether the Telpak rates were "high enough to cover the costs attributable to the business retained or obtained, [and thus to] contribute to the overall economy of the operation" rather than to "impose a burden on other classes of users," *Id.* at 1115-6. It therefore remanded the case for the limited purpose of allowing AT&T to submit "additional cost data" to permit the Commission to determine "whether or not the existing rates are compensatory" *Id.* at 1118. It also indicated that AT&T might file such "revised tariff schedules as may be indicated by such data" *Ibid.*

Under this formulation of the problem a relatively prompt determination of the validity of the Telpak rate level, including any new and higher rates AT&T might believe it could justify, would have been possible. It would not be necessary to canvass questions of the relationship of the Telpak rates to those charged for other AT&T private line services, to say nothing of the regular message services, or as to the overall return to which the carrier was entitled for its interstate operations as a whole. In short, if the Commission had adhered to its original intent it could have provided Telpak users with the expedited hearing on any carrier filed increases which is guaranteed them by Section 204 of the Act.

The Commission, however, did not adhere to this original procedure. Instead, as we have indicated, it chose to incorporate the hearing on the validity of the rates for Telpaks C and D into a complex general proceeding involving AT&T's entire rate structure. This transformation of the nature of the inquiry into the Telpak rate level, while in our opinion quite unnecessary, would not have raised any legal questions as long as all of the rates involved, including Telpak, were firm rates, subject only to prospective change under Section 205

of the Act. But the matter ceased to be solely a question of the Commission's choice of how best to manage its affairs when it consolidated into this general investigation the priority hearing required by Section 204 of the Act to determine the validity of the carrier initiated rate increases.

The history of the transformation of the limited question of proper level of rates for Telpaks C and D into a general proceeding looking into the entire question of AT&T's rate level and rate structure can be briefly recounted. The Commission had inaugurated its general AT&T rate investigation in Docket No. 16258, on October 27, 1965, when the earlier Telpak case was on appeal. 2 F.C.C. 2d 871. This general investigatory proceeding had, *inter alia*, provided for determination of whether all of AT&T's rates, other than the TWX and Telpak services as to which separate proceedings were then pending, met the standards of the Act, and whether the Commission should prescribe new rates if it concluded the statutory standards were not being met. *Id.* at 874. Then, on November 9, 1966, after the Commission's original decision as to Telpaks A and B had been affirmed on appeal and the court's stay of the original Telpak case had been lifted, the Commission issued a new Memorandum Opinion and Order which closed out the separate Telpak proceeding (Docket No. 14251) and expanded the issues in the general investigatory proceeding to include consideration and possible prospective modification of the rates for Telpaks C and D. (7 F.C.C. 2d 30 (1966); J.A. 7). It made clear on rehearing, that it still considered the only issue as to Telpaks C and D was whether they were "compensatory" but this question, the Commission now stated, "deals with the overall level of earnings" of the carrier "and is, therefore, appropriate for determination in Docket No. 16258." (6 F.C.C. 2d 177; J.A. 16, 20-21).

At that time, prior to any Telpak increase filing, the Commission apparently still recognized the very real distinction between an investigation under Section 205 of the Act and an expedited proceeding on a suspended rate increase under Section 204. For while it indicated that the carriers additional cost data as to Telpak C and D, now to be filed in Docket No. 16258, "may be accompanied

by proposed changes in rates" (J.A. 8), it went on to state: "we do not wish such specific rate issues to become part of the more general issues of Docket No. 16258. Accordingly, when such tariff filings are made, if need therefore arises, it is expected that those issues will be examined in a separate docket." (*Ibid.*)

When in 1968, AT&T filed the first of its two Telpak rate increases, the Commission did in fact suspend the increase and set it for separate hearing in the new Docket No. 18128. FCC Order of April 10, 1968, FCC 68-388, not reported, (J.A. 170). But on July 10, 1968, the Commission issued a new Memorandum Opinion and Order (13 F.C.C. 2d 853; J.A. 176) which in at least two respects significantly and adversely affected the statutory rights of Telpak users to a speedy determination of the proposed major increase in the Telpak costs which were to become effective on September 1, 1968. First it expanded the new proceeding to include consideration, under Section 205 of the Act, of the validity of *all* of AT&T's *private line services* (except those pertaining to the audio and video program transmission services) and the possible prospective revision of all these other rates. (J.A. 181). And second, it indefinitely deferred the commencement of the rate increase proceeding pending completion of both Phase I-B of the general investigatory proceeding in Docket No. 16258 which was then in active hearing status,⁶ and

⁶ Docket No. 16258 had previously been split into two phases, see 2 F.C.C. 2d 142. Phase I-A, involving overall revenue needs for AT&T, had culminated in a decision of July 5, 1967, 9 F.C.C. 2d 30, determining that a rate of return between 7% and 7.5% was appropriate for AT&T and ordering a reduction in rates to effect a revenue reduction of \$120,000,000 annually. This reduction AT&T chose to make entirely in its regular message (MTT and WATS) services. Phase I-B was intended "to deal with all of the matters relating to a just and reasonable level of earnings for respondents' interstate operations and major changes thereof" 2 F.C.C. 2d, *supra*, at 143. As of the time of the Commission's order of July 10, 1968, AT&T had filed considerable data in Phase I-B, but cross-examination had not yet been held thereon, nor had the other parties to the proceeding, including Telpak users, had an opportunity to present their evidence.

also of the separate proceeding, Docket No. 17457, the Commission had previously initiated to examine the propriety of a facet of the Telpak rate structure — the so-called “sharing” privilege authorized under AT&T’s tariff for a limited class of customers — *not* including AIA or its members. (J. A. 180-181).

AIA pointed out to the Commission at the time that the effect of the procedure it was adopting was inevitably to deprive the Telpak users of the prompt hearing on the rate increase to which they were entitled if the increases were to be allowed to go into effect. (J.A. 192-193). We did not oppose the procedure as such, in part because AIA believed that the Commission’s determination of the pending “sharing” case would be relevant to any permanent conclusion as to the proper level for the Telpak service, in part because as long as user rights were adequately protected we were not prepared to argue that the Commission could not adopt any procedure it chose for determining the various interrelated questions as to the carrier’s rates. See, *e.g.*, *Federal Communications Commission v. WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 272 (1949). AIA argued, however, that if the Commission chose to defer the commencement of the proceeding on the rate increase, it could do so only if it took steps, pursuant to its authority under Section 4(i) of the Communications Act, to prevent the rate increase from becoming effective pending the determination of these other proceedings.

AIA’s Petition for Interim Relief to this effect was, however, rejected by the Commission by order of August 28, 1968. (14 F.C.C. 2d 564; J.A. 205). In this order the Commission denied it had any authority under the “general powers” of Sections 4(i) and 303(r) to affect the “specific and limited authority set forth in the Act with respect to tariff filings . . .,” and stated that AIA was, in any event, “under the misapprehension” that deferral of proceedings in Docket 18128 amounted to a deferral of hearings on the Telpak increase, since the “overall level of TELPAK rates, including the increased rates effective September 1, 1968, is directly at issue in Docket No. 16258 . . . which we have ordered expedited.” The only thing in issue in 18128, the Commission held (despite its action which had expressly put in issue all private line

rates save the program transmission services, see *supra*, p. __), was the "internal rate structure components" of Telpak. (J.A. 205)

AIA was under no misapprehension. Even if the procedure contemplated by the Commission had been followed, the delay inherent in considering the appropriate Telpak rate level as part of a complex proceeding involving all of the carriers' rates, rather than separately deciding whether the carrier had justified the new Telpak rates, would have been seriously detrimental to the Telpak users' rights. But, as indicated in the Statement, no prompt determination of either Phase I-B of Docket No. 16258 or the sharing proceeding were forthcoming. The latter case remains undecided twenty months later. And, in what is certainly a classic reversal of position, Phase I-B of Docket No. 16258 culminated in a Commission Order of July 29, 1969 (18 F.C.C. 2d 761; J.A. 214), in which the Commission announced that the "threshold" issues, which allegedly had to be resolved *before* the rate increase hearing could commence, could instead only be handled in the context of particular carrier initiated rate proceedings.

Even then, the Commission did not move to revitalize Docket No. 18128. However, it did adopt procedures which, while they were not calculated to provide any quick resolution of the then pending rate increases proceeding, at least gave Telpak users assurance (1) that no further Telpak rate increase, such as AT&T was threatening to file, would be filed until the basic data which the various parties believed necessary for evaluating Telpak rate levels had been prepared by the carrier after consultation with the interested parties; and (2) that any new rate filing would be subject to such authority as the Commission might have to prevent its immediate effectuation.

The so-called "Statement of Principles" which the parties to Docket No. 16258 put before the Commission but which it expressly refrained from endorsing (J.A. 220-224), was, as far as its substantive content was concerned, little more than a statement of the conflicting positions which had been presented in Docket 16258. But the parties agreed to and the Commission expressly approved (J.A. 217, 224-226), a series of procedures to be followed in

the future. These procedures provided that the carrier would "make new studies in conformity with the principles agreed to herein, and *thereafter* to file such further specific rate adjustments as may be consistent therewith . . ." and that "[n]o carrier initiated rate level increases will be filed until the new cost studies . . . have been completed *and made available to the parties hereto*". Moreover, the agreed procedures expressly provided that: "The effective date of any such rate level increase *will* be subject to such authority as the Commission may possess. The parties do not agree as to the scope of the Commission's authority under various circumstances to reject, suspend or postpone the effectiveness of carrier initiated rates, and no party, by this agreement, waives its position on this question." (J.A. 224-225; emphasis added)

As discussed *infra*, pp. 24-25, the agreed procedures were not complied with in a number of material respects by AT&T prior to filing a further Telpak rate increase on October 1, 1969, and these deficiencies constituted a separate reason why the new increase should have been rejected. But even if this had not been the case, the Commission, if it continued to refuse to give any consideration to the validity of the rate increases except as part of a general Section 205 investigation into the AT&T private line rate structure, could only provide the Telpak users the protection they were entitled to under Section 204 by exercising its authority under Sections 4(i) and 303(r) to prevent the new increase from becoming effective.

Instead, the Commission compounded the error by its *ex parte* agreement with AT&T to provide for offset filings reducing the rates for the MTT and WATS services by an amount equivalent to the Telpak increases. We must perforce accept the Commission's assurances in its Memorandum Opinion and Order on rehearing (J.A. 725-726) that this agreement was not deliberately intended to prejudge the decision on the Telpak rates and constituted an effort by the Commission's staff to insure that the reduction in AT&T's overall earnings then being negotiated in the closed "continuing surveillance" proceedings would not be negated by the proposed Telpak increases. But the effect of

this agreement, aside from inevitably making the Commission less receptive to the suggestions of the Telpak users which would have accomplished the same result of precluding any increase in AT&T's revenues, was to tie the rates of still additional services to the Telpak proceeding. The result of this action has been that the Commission has now expanded the proceeding it has ordered in Docket 18128 — but which is yet to start six months after the October 1, 1969 filing — to include consideration of the proper rates to be set for *all* of AT&T's interstate services. See *American Telephone & Telegraph Company and the Associated Bell Companies, Charges for Interstate and Foreign Communications Service*, Docket Nos. 16258, *et al.*, Memorandum Opinion and Order of February 24, 1970, F.C.C. 70-191, Appendix B, *infra*.

While the violation of user rights to a prompt hearing on the increases was the primary thrust of AIA's petition to reject the new increases or postpone their effectiveness (J.A. 192-193), the Commission does not mention the issue in either of its Memorandum Opinion and Orders rejecting its requests for relief. The closest the Commission comes in its Memorandum Opinion and Order of October 29, 1969, to giving any reason for failure to exercise its authority — which, at least as to Section 203(b), it did not deny — is its statement that the accounting order which it had adopted, provided adequate protection to the Telpak users. (20 F.C.C. 2d 383, 387; J.A. 563). This, as the Commission, itself, subsequently recognized upon rehearing (21 F.C.C. 2d 1, 6; J.A. 730), is simply not the case.

The inadequacy of the refund provision, even where the agency makes a practice of ordering refunds of overcharges with interest,⁷ has long been recognized by the Courts. See *e.g.*, *Federal Power Commission v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 155-6 (1962), (holding the FPC acted "in the best tradition of effective administrative practice" in invoking the Natural

⁷ Faced with a claim by AT&T that refunds, to say nothing of interest thereon, might be inappropriate even if the Commission were to hold the Telpak rate increases to be unlawful in whole or in part (J.A. 640-641, 643-644), the Commission has been extremely coy.

(Continued)

Gas Act's equivalent of Section 4(i) to specially expedite a part of a rate case proceeding since "experience has shown [the refund remedy] to be somewhat illusory . . ."); *Federal Power Commission v. Hunt*, 376 U.S. 515, 524-525 (1964), (again referring to the inadequacy of refunds as support for the FPC's refusal to permit any rate increase while the proceeding on the initial rate for a sale was still in progress).

It is true that the refund problems in the telephone situation where the carriers deal directly with the ultimate customer are not the same as in the wholesale rate situation presented in the Power Commission cases; but they are no less real. Thus refunds will not protect Telpak users who, like AIA member Martin-Marietta, have incurred over \$300,000 worth in termination costs when the initial Telpak increase made it economically infeasible for the company to proceed with a planned move to a more sophisticated type of telephone network. Nor will refunds take care of the significant expenses in time and money which must be expended by any major industrial user of Telpak in reevaluating both its short-range and long-term communications plans whenever there are significant changes in Telpak rates, even on an interim basis. And, as AT&T (J.A. 708-711) and the Commission, (J.A. 730) agree, the refund mechanism is worthless to take care of the situation where a user switches *ad interim* from Telpak to some other communications service which is less expensive than Telpak service under the increased rate allowed to become effective pending the proceeding on its validity, and such rate is later held to have been unlawful in whole or in part.

(Footnote 7 Continued)

In its Memorandum Opinion and Order on rehearing, it continued to refer to its *power* to order refunds, with interest, while carefully refraining from saying it would do so. Thus it states, "If . . . the increased rates are ultimately held to be unlawful, and a reduction is ordered, a refund, with interest, of all increased amounts received by the carrier *may* be made." (21 F.C.C. 2d at 3; J.A. 726; emphasis added). This is of small comfort to Telpak users who are aware that in the only other formal rate increase case in recent years, the Commission, while ordering refunds, refused to order any interest payment. See *AT&T; Charges for Private Line Services*, 34 F.C.C. 1094, 1096 (1963).

We need not belabor the point since recognition of the inadequacy of the refund remedy is built into the statutory scheme; if refunds were adequate protection to the customers there would be no need for the 3-month suspension period nor for the requirement of Section 204 that the hearing on the increased charge be expedited and preferred. Nor is it any answer to refer the Telpak users to their right to seek damages or reparations arising out of unlawful charges. Recognition of the inadequacy of this remedy, except possibly as relief from individual carrier actions in derogation of their tariffs or the law, was what led to the enactment of the suspension provisions in the Mann-Elkins Act of 1910, 36 Stat. 552, *cf.*, *Arrow Transportation Co. v. Southern Railway Company*, *supra*, 372 U.S. at 662-664.

In its Memorandum Opinion and Order on Rehearing the Commission advanced an alternative reason for refusing any relief to the Telpak users which is, if anything even more specious. The Telpak users, the Commission stated (21 F.C.C. 2d 1, at 4; J.A. 727-728) knew that AT&T claimed that higher rates were justified than those it put into effect in 1968 and should have been pleased by the fact that the carrier had filed the increase in two steps rather than all at once as it had originally intended.⁸ Moreover, the Commission said, *Ibid.*, it had previously advised Telpak users that they should be prepared for the "contingency of Telpak rates [sic] increases or even the elimination of the service."

For this latter proposition the Commission cited its unreported Memorandum Opinion and Order released April 12, 1968, initiating Docket 18128. But what the Commission actually said in that Order, adopted over a year before the approved agreement on procedures for any second round of Telpak increases,

⁸ AT&T had filed increased Telpak rates on February 1, 1968, at the level now in effect, but had withdrawn them on March 13, 1968, in the face of user opposition, in favor of the lower rates which became effective on September 1, 1968.

but after the withdrawal of the original one-step increase, was quite different. Specifically, the Commission stated that, (J.A. 172):

Moreover, it should clearly be understood by the Telpak users, that, *in the event a complete hearing record indicates that increases in the level of Telpak rates are justified or required*, or that the Telpak classification should be eliminated, any increases *occasioned thereby* will become effective without delay. The users should henceforth govern themselves accordingly, and their communications budgets should be prepared with this in mind (emphasis added).

It is clear that this statement was *not* notice to Telpak users that they would have to suffer indefinite imposition of higher rates, prior to any hearing showing the increases to be required. It was instead a warning that the Commission was prepared to put any *final* decision into effect and would not itself stay the effectiveness pending rehearing or user appeals.

It is equally clear that notice that AT&T intended to file a further increase is not a basis for the Commission's permitting the new increase to be filed or put into effect. On the contrary, the Telpak users in July 1969 agreed to the Statement of Principles, including the procedures which the Commission expressly approved at the time but has subsequently ignored, which specifically required user consultation in the development of up-to-date data prior to any new rate filing, and additionally provided that the effective date of any new filing "will be subject to such authority as the Commission may possess." 18 F.C.C. 2d at 768. Under these circumstances, it is, to put it mildly, strange now to have the Commission state it will not exercise the power it possesses because the Telpak users were aware that it might be called upon to do so.⁹

⁹ The claim by AT&T and Western Union that the Telpak users have benefitted by having the lower increases in effect between September 1, 1968 and February 1, 1970, and thus have no equitable basis for objecting to permitting the higher new rates to be effective for the remainder of the indefinite period before the Commission decides the greatly expanded proceeding into which the increased rate case has been merged, is entirely specious. The statutory rights of telephone users to a speedy hearing on rate increases are not eliminated by a

(Continued)

**B. AT&T's Failure to Conform to the Established Conditions
Precedent to Any New Rate Increase.**

As we have made clear, even if the procedures contemplated by the Statement of Principles agreed to by the parties to the general rate investigation had been complied with by the carrier, it would have been improper in the circumstances for the Commission to permit any new increase to become effective. The clear failure of AT&T to comply with the agreed procedures in several significant respects constitutes, however, another reason why the Commission committed reversible error in failing to exercise its authority to reject the new filing.

The agreed procedures had provided that "interested persons will be afforded a timely opportunity to express their views with respect to the *formulation* of the appropriate methods" for making the new studies and that this opportunity was to be provided "[b]y such formal or informal procedures as the Commission deems appropriate." (J.A. 222). However, no formal or informal procedures were ever established by the Commission or its staff to have the carrier consult with Telpak users. Nor did the carrier on its own initiate any such discussions with any other user group outside of the transportation and broadcast industries. Thus, despite the fact that industrial users, like AIA's members, and the United States government, account for by far the largest share of Telpak usage, these parties were afforded no role in the formulation of the new studies, including those purporting to predict their response to various levels of Telpak rates, (J.A. 357, 374), and the study documents were "made available" to those who received them at all, several days before the rate increase was filed. (J.A. 516).

(Footnote 9 Continued)

unilateral decision by the carrier to split an increase of approximately 100% in two parts. The original increase has been in effect for almost a year and a half, without any hearing having been commenced. The fact that AT&T might have originally asked for more cannot justify the Commission's failure to exercise its authority to restore the statutory balance of interest between carrier and user by deferring the effectiveness of a new rate increase which cannot affect the carriers' revenue position.

Nor did AT&T otherwise comply with the procedures which had been established. Thus,¹⁰ these procedures expressly contemplated that no new rate increases would be filed until "up-to-date cost data" was produced by the carrier (J.A. 222, 224), including a new fully distributed cost study covering an appropriate "test period." (J.A. 221) It was expressly recognized that the carriers would "make new studies in conformity with the principles agreed to" in the statement, despite the existence of detailed studies in the record in Docket No. 16258. (J.A. 224) However, when AT&T, on October 1, 1969, filed its new Telpak rate increase, its "new" fully distributed cost study, though submitted with reference to a rate scheduled to become effective at the earliest on November 1, 1970, was still based upon "total embedded investment, expenses, and taxes . . . as of the latter part of 1967." (J.A. 248). Moreover, the study did not reflect, nor even refer to, the \$150 million reduction in MTT and WATS rates which was in process of final negotiation at the time of filing. Nor was there any reference to the proposed reductions in the Federal Income Tax surcharge, then in final stages of passage in the Congress, from 10% to 5% on January 1, 1970, and its complete elimination as of July 1, 1970.¹¹

¹⁰ The briefs of some of the other petitioners discuss in detail some of the other ways in which the carrier clearly deviated from the procedural prerequisites to a valid rate filing as set out either in the Commission's general rules governing such filings or the procedures specially established for the present case in the Commission's Order of July 29, 1969. We adopt these arguments without burdening the Court with repetition thereof.

¹¹ Significantly, the new fully distributed cost study, despite its deficiencies, showed that the proposed new Telpak rates would earn a greater rate of return than the ordinary private line telephone service under each of the six methods utilized for allocating costs and revenues and higher than the regular message toll telephone service under the four methods which AT&T indicated were most appropriate for comparative evaluation purposes. (J.A. 252). Under three of the six methods Telpak was shown as earning more than the average return for AT&T's interstate services as a whole.

The Commission's Memorandum Opinions rejecting the user requests for relief do not discuss the merits of any of these claims. Paragraph 9 of the Commission's Memorandum Opinion and Order of October 29, 1969, does note the existence of these contentions. But while the Commission states that it would "be concerned if any of the parties departed substantially from the import of this accord," it does not attempt to decide whether AT&T in fact had done so. Instead it merely indicated that "the parties who allege certain departures from the accord may raise questions . . . with respect thereto" in the comprehensive hearing it was ordering for the indefinite future. (J.A. 561)

This position was not based upon a Commission conclusion that it lacked authority. Though its authority to reject procedurally defective rate filings obviously stems from Section 4(i) of the Act, the Commission has long asserted this power and had in fact rejected, as defective under its rules, an AT&T filing seeking to increase rates in another private line service less than a month before the Telpak increase was tendered.¹² Instead, the Commission, in what can most favorably be characterized as an astounding lapse in memory, denied that AT&T was in any way bound by the procedures set out in its Memorandum Opinion and Order of July 29, 1969, since "we made it abundantly clear . . . that we were not necessarily approving the stipulation, merely noting it." (J.A. 561)

As indicated above, this statement is true *only* as to the substantive content of the proposed Statement of Principles which the Commission did not endorse. It is quite incorrect as to the procedural part of the agreement which the Commission expressly approved. Specifically it said (18 F.C.C. 2d 761, 764):

¹² See *American Telephone and Telegraph Company, Revision of Tariff FCC No. 260, Series 6000 and 7000 Channels*, Transmittal No. 10563; Letter of September 17, 1969, from Chief, Common Carrier Bureau, rejecting the revision involving the series 6000 Channels (unreported).

. . . it is our judgment that the proposed procedures will provide a better and more timely method of reaching a final conclusion on these important matters and will best conduce to the ends of justice. We, therefore, note the stipulation (without necessarily approving it) and approve the procedures, except as stated in Paragraph 13 below.

In short, the Commission having expressly approved in July, 1969, the procedures which AT&T was to follow *prior* to its filing any new Telpak rate increase, in October 1969, repudiated its action of three months' standing, and made no effort to determine whether AT&T had in fact complied therewith. And it did so despite the fact that in July it had approved the agreement between the carrier and its customers that any new filing would be subject to such authority as the Commission possessed to postpone the effective date of such rate increase. See pp. 18-19, *supra*. The arbitrary nature of such action speaks for itself.

C. The Rights of the Carrier are not Impaired by Exercise of the Commission's Authority to Preclude the Telpak Rate Increases from Becoming Effective.

Although we demonstrate in Part II of this brief, *infra*, that the Communications Act provides the Commission with considerably greater authority to match its procedures to the particular requirements of abnormal situations than the Interstate Commerce Act on which it was patterned, we do not suggest that only the consumers of communications services are entitled to protection. The rate making provisions of the Communications Act involve an attempted Congressional accommodation of the often conflicting interests of the carriers and their customers; and we recognize that, in exercising its general authority under Sections 4(i) and 303(r), the Commission must take into account the interests of the carrier as well as the users of services. Nevertheless, in the present case such balancing of interests had to result in action precluding the new rate increase from becoming effective, since the carrier could not be harmed in any respect by such action.

If AT&T had complied with the procedural conditions precedent to the new rate increase which had been approved by the Commission, and if the purported justification for such rate increase had been a claimed necessity on the part of the carrier to improve its revenue position so that it could earn a minimum reasonable return on its investment an arguably different case would have been presented. Under such circumstances, it might have been possible to contend that Commission action under Sections 4(i) or 303(r) of the Act to preclude the new rate from going into effect for more than three months was "inconsistent with the Act" or "inconsistent with law" within the meaning of those provisions. Even then, however, the Commission would by no means necessarily be precluded from acting to prevent the rate increase; as the cases discussed in Part II of this brief, *infra*, make clear, the rate filing provisions of the Act do not give the carriers an "invincible right to raise prices subject only to a [three] months' delay and refund liability." *Permian Basin Area Rate Cases*, 390 U.S. 747, 779. On the contrary, the Commission possesses extensive authority to preclude rate changes for far more than three months even in circumstances where the carrier might as a result be foreclosed from earning a fair return on its investment. Nevertheless, a Commission refusal to preclude a new rate filing in such a case, based upon a reasoned analysis of the competing interests, conceivably might have been within its discretion.

Here, of course, no question of the adequacy of the carrier's interstate revenues is involved. On the contrary, AT&T admittedly was earning well in excess of a reasonable return and was in process of negotiating a general rate reduction of approximately \$150,000,000 per annum. In recognition of this situation the carrier entered into the *ex parte* agreement to reduce its rates

for other services by an amount equivalent to the proposed Telpak increases as of the time the latter became effective.¹³

Nor can it be argued that the Commission's failure to grant relief to the Telpak users constituted a conscious choice between this group of AT&T's customers and those using its MTT and WATS services. It would obviously have been improper for the Commission, in the present circumstances, to have permitted the higher new Telpak rates to be filed and go into effect in order to secure an interim but non-refundable reduction in other rates, regardless of whether such action resulted from the *ex parte* agreement between the Commission and the carrier or not. But this Court need not consider the legal question which would have been presented since the Commission in its Memorandum Opinion and Order on reconsideration expressly denied any connection between the offset agreement and its evaluation of the Telpak rate increase. At the same time the Commission made clear that it had formulated no views, even of a tentative nature, as to the merits of the Telpak increase or the appropriate relationship between the Telpak rates and those for the MTT and WATS services.

The Commission stressed that it had "made no decision as to the lawfulness of the Telpak tariff offering or the specific rates provided for therein,"

¹³ Indeed, it would appear that, in the circumstances, AT&T might well have responded favorably to a Commission request to postpone the effectiveness of the Telpak rate increase beyond the three months' period. As the courts have pointed out, this is a regular practice at the Interstate Commerce Commission where a rate increase proceeding (which that Commission invariably commences within a month or so of the rate filing) cannot be completed before the statutory suspension period runs out. See *Amarillo-Borger Express Inc. v. United States*, 138 F. Supp. 411, 414 n. 3 (N. D. Tex., 1956). And it is a common occurrence under the Communications Act. Thus the Commission on January 28, 1970, requested AT&T to defer putting into effect for an additional ninety days a rate increase for the transmission of AM and FM broadcast radio programs, which AT&T had also filed on October 1, 1969, and which also had been suspended for three months (FCC News Report No. 5732, January 30, 1970), and AT&T immediately agreed to do so. See also, FCC News Report No. 2782, March 1, 1968, announcing AT&T's agreement to a *one year* postponement in making effective increased charges for the private line program and radio transmission services.

(J.A. 728), and that it had not determined what constitutes the correct "tool for pricing the Telpak service, or any other service offering, nor how . . ." various types of costs should be related to corresponding rates. (J.A. 729) "The proposal of the increased private line and the decrease in MTT and WATS rates was solely AT&T's . . .," the Commission said, and it expressly refused to determine before hearing "the relative equities affecting the various customers of AT&T's service." (J.A. 726)

The Commission could not have done otherwise in the light of the data before it. AT&T has not attempted to justify the offset reductions on grounds they were required, along with the Telpak increases, to produce a proper relationship between the MTT and WATS rates on the one hand and the private line rates, including Telpak, on the other. On the contrary its position is that no consideration should be given to any rates outside the private line services in the hearing in Docket No. 18128. See *Motion to Delete Issues*, filed by AT&T in Dockets 16258, 18128, 18684 and 18718 on March 16, 1970, p. 6. And nothing else before the Commission could have supported even a tentative conclusion that a proper design of AT&T's rates would call for a reduction in MTT and WATS rates equivalent to the increase sought for Telpak. On the contrary, as we have seen, the fully distributed cost study submitted by AT&T on October 1, 1969, in addition to being two years out of date, did not reflect the \$150,000,000 rate decrease in MTT and WATS rates AT&T had just agreed to file. And, even then, it showed that the existing Telpak rates were compensatory under all six methods for calculating fully distributed costs, *supra*, p. 25, n. 11.¹⁴ Moreover, the study indicated that the proposed new rates would provide a higher return under all methods than AT&T received from the regular private line telephone service and returns higher than those indicated for the MTT service under three of the six methods; a fourth shows a stand-off. (J.A. 252)

¹⁴ Western Union in its Response to the Motions for Stay refers to earlier studies purporting to show as of 1964 and 1965 miniscule or negative returns for Telpak on a fully distributed cost basis. But these studies reflect the substantially lower original Telpak rates, not those which have been in effect since September 1, 1968, and a much smaller usage of the Telpak service, then in its infancy.

In sum, there were no offsetting factors which the Commission relied upon — or could have relied upon — for refusing to take available action to protect the rights of Telpak users by precluding any new increase from becoming effective. Its failure to do so, despite its assumption that it possessed the power to act (which we show in Part II, *infra*, is not really subject to dispute), can at best be described as an abuse of discretion which this Court can and should direct be promptly corrected.

II. THE COMMISSION POSSESSED THE POWER TO REJECT THE LATEST TELPAK RATE INCREASE OR TO PREVENT IT FROM BECOMING EFFECTIVE PENDING COMPLETION OF THE PROCEEDING TO DETERMINE ITS VALIDITY.

Various Telpak users, including petitioner AIA, have throughout the proceeding before the Commission contended that the Commission enjoyed plenary authority under Sections 4(i), 203(b) and 303(r) of the Communications Act either to reject the new rate filing or to prevent the increased rates from becoming effective prior to the Commission's determination of the validity of the original Telpak increase. AT&T, in pleadings before the Commission and this Court, has challenged the existence of any authority on the part of the Commission other than the right to reject rate filings which fail to specify the proposed effective date or to suspend a rate for a maximum period of three months. The Commission, while asserting authority in other situations which clearly is inconsistent with any disclaimer here, has carefully refrained from defining the scope of its authority to take the necessary action to afford petitioners the relief they seek.¹⁵ But the legal questions as to the Commission's authority to preclude a new rate increase from going into effect under the circumstances presented here have been resolved in a long series of cases involving the Communications Act and the analogous provisions of the Natural Gas Act. The issue posed by AT&T as to the Commission's authority to grant the relief petitioners sought is thus not only ripe for determination by the Court in this proceeding, but no reason exists for not doing so.

¹⁵ In its Memorandum Opinion and Order of October 29, 1969, the Commission denied authority under Sections 4(i) and 303(r), but reserved its views as to the scope of its authority under Section 302(b). (J.A. 562) In its Memorandum Opinion on Rehearing of January 19, 1970, it signally refrained from reiterating its position as to its lack of authority under Sections 4(i) and 303(r). Instead, it confined itself to the general statement that, while it did not "consider it warranted" to grant the relief sought by the Telpak users, "such action is not considered dispositive of the extent of our authority with respect thereto" (J.A. 728). Significantly, as the pleadings in this Court seeking a stay of the Commission's action here involved had pointed out (AIA Petition for Stay, p. 26), the Commission, itself, had invoked Section 4(i) to preclude a rate filing by Western Union. See fn. 4, *supra*, p. 7.

AT&T's argument against the existence of Commission authority to preclude a new rate increase from becoming effective rests on the assumption that the Commission's powers over common carriers under the Communications Act are coextensive with those of the Interstate Commerce Commission over railroads under the Interstate Commerce Act as it existed when the Communications Act was adopted in 1934. This simply is not the case. It is true that the provisions of Title II of the Communications Act, which apply specifically to common carriers, were not only patterned on analogous provisions of the Interstate Commerce Act but in many instances taken without change therefrom. It is equally true that many of the differences in the language between the two Acts are not the subject of any discussion in the legislative history of the Communications Act, which is, for the main, limited merely to general statements that a particular section of the Communications Act is based upon a specified section of the Interstate Commerce Act. But it is hornbook law that such general statements cannot justify ignoring the substantive impact of obvious differences in language. And in the present case the differences between the two Acts are clearly material.

Thus Congress in adopting the Communications Act included in Title I of the Act, among the "general provisions" applicable to all spheres of its regulatory authority, the broad provisions of Section 4(i). These specify that "the Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." This provision and analogous language in a number of other regulatory statutes has been broadly construed by the courts as authorizing many forms of agency actions not expressly empowered by the governing statute but reasonably related to the objectives thereof. But *no* such provision is available to the Interstate Commerce Commission in dealing with the rate filings of railroads and the other carriers subject to the provisions of Part I of the Interstate Commerce Act.

The sweep of the Commission's authority under Section 4(i), as expressly approved by the Courts, is very great. Thus, in the *United States v. Southwestern*

Cable Company, 392 U.S. 157, 180-181, the Supreme Court expressly held that Sections 4(i) and 303(r) of the Communications Act gave the Commission authority to order a temporary stay of CATV operations without hearing, pending a determination of whether they met Commission imposed standards of public interest. It did so despite the fact that the specific provisions of the Act, providing for cease and desist orders, require an advance hearing. Similarly, in *United States v. Storer Broadcasting Company*, 351 U.S. 192, 202-203, the Court expressly held that the Commission had authority under Sections 4(i) and 303(r) to deny, without the hearing otherwise prescribed by Section 309 of the Act, broadcast applications the grant of which would be in violation of the Commission's multiple ownership rules. See also *Western Union Telegraph Co. v. United States*, 267 F.2d 715, 722 (2nd Cir., 1959); *Metropolitan Television Company v. Federal Communications Commission*, 110 U.S. App. D.C. 133, 289 F.2d 874, 876 (1961).

AT&T, and the Commission in its Memorandum Opinion and Order of October 29, 1969 (J.A. 194, 209, 562),¹⁶ took the position that the Commission's authority in rate matters must be found within the bounds of the specific rate provisions of Title II of the Communications Act. But see *Western Union Telegraph Co. v. United States*, *supra*. Exactly the same line of argument made by the carriers was recently rejected by this Court in *General Telephone Company of California v. Federal Communications Commission*, ___ App. D.C. ___, 413 F.2d 390, 403-404, *certiorari denied*, 24 L.Ed 2d 163 (1969). There

¹⁶ The Commission holding, which it carefully avoided reasserting on rehearing (J.A. 724, 728), took the form of a reaffirmation of its similar holding at the time of the first Telpak rate increase. There the Commission had held (14 F.C.C. 2d 564, 566-7; J.A. 209) that "the specific and limited authority set forth in the Act with respect to tariff filings delimits the Commission's power in this respect as opposed to the more general powers which were controlling in the *Southwestern Cable* case." This statement was inconsistent with the Commission's own views of its powers as of the date it was made (see, e.g., *General Telephone Company of California*, 13 F.C.C. 2d 448, 461-62), and, as indicated in the text above, directly contrary to the opinion of Judge Burger in the appeal in the *General Telephone* case, decided on April 30, 1969.

the Commission had invoked the cease and desist provisions of Section 312(b) of Title III of the Act as a sanction against carrier violations of Section 214 of Title II. As in the present case, the carriers argued that the only sanction for violation of Section 214 was to be found in subsection (c) thereof, which authorizes a District Court to enjoin unlawful action by the carrier. This Court unanimously rejected their contention, pointing out that Section 312(b), like Sections 4(i) and 303(r), is, by its terms, broad enough to apply to Title II of the Act and that the injunctive authority provided in Section 214(c) employed permissive terminology which does not "suggest its exclusivity." *Ibid.*

The holding in this case is directly applicable to the present situation. Thus, AT&T has stressed that Section 203(d) of the Act provides that the Commission "may" reject a rate filing where the rate schedule as filed does not provide the lawful notice of the proposed effective date. But, following the reasoning of the *General Telephone* case, the permissive language in which the section is written cannot establish any "exclusivity" against the invocation of Section 4(i) to reject filings which otherwise fail to comply with the provisions of the Act or the orders of the Commission. Likewise, while the Commission, pursuant to its authority under Section 204 of the Act, "may" suspend a rate filing for a period of not more than three months, nothing therein can be read as precluding the appropriate exercise of the Commission's authority under Sections 4(i) and 303(r) to prevent rate increases from being filed or at least from becoming effective pending completion of proceedings determining the validity of the existing rates.

Moreover, it has been expressly held under the analogous provisions of Section 16 of the Natural Gas Act¹⁷ that it is *not* inconsistent with the provisions of that Act for the Federal Power Commission to take action to reject

¹⁷ Section 16 of the Natural Gas Act, 15 U.S.C. 717(o), authorizes the Federal Power Commission to "perform any and all acts, and to prescribe, issue, make, amend and rescind such orders, rules and regulations as it may find necessary or appropriate to carry out the provisions of this Act."

a rate filing or to preclude its filing altogether in appropriate circumstances. Thus, in *United Gas Pipeline Company v. Mobile Gas Corp.*, 350 U.S. 332, 347, the Supreme Court held that:

There can be no doubt of the authority of the [Federal Power] Commission to reject the unauthorized filing under its general powers to issue orders 'necessary or appropriate to carry out the provisions of this Act,' § 16, and its failure to do so and its order 'permitting' the new rates to become effective were in error.

And Section 16 of the Natural Gas Act has also been held to authorize the Federal Power Commission to preclude any filing of a rate increase while a previous increase is still under suspension, *Amerada Petroleum Corp. v. Federal Power Commission*, 293 F.2d 572 (10th Cir. 1961), *cert. denied*, 365 U.S. 936 (1962); to preclude any rate increase filing while the initial rate for a sale was being determined in a certificate proceeding, *Federal Power Commission v. Hunt*, 376 U.S. 515 (1964); and to preclude any rate increase within a fixed period after the just and reasonable rates had been set, *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).¹⁸ See also, *American Commercial Lines, Inc. v. Louisville & Nashville R. Co.*, 392 U.S. 571, 578, 591-593 (1968), where the Supreme Court upheld the right of the Interstate Commerce Commission to refuse to consider contentions in support of a rate change, which were in issue in a pending rule making proceeding. As Justice Harlan stated in the *Permian Basin* cases, *supra*, 390 U.S. at 779:

¹⁸ This Court's decision in *Willmut Gas and Oil Company v. Federal Power Commission*, 111 U.S. App. D.C. 49, 294 F.2d 245, *cert. den.*, 368 U.S. 975 (1962), to the extent it suggests the Power Commission has no authority under Section 16 of the Natural Gas Act to take action to reject or otherwise preclude improper rate filings, was inconsistent with the *Mobile* case as of time it was issued and though often cited in briefs, has not been followed in the cases cited above affirming various Commission actions precluding rate increases. The *holding* in *Willmut* is explainable in that the several increases involved in that case all stemmed from a series of increases in the supplier pipeline's gas purchase costs which allegedly required increases in its rates to provide it a reasonable return on its investment. As indicated in the text, no such reason for permitting the increases to become effective is available here.

. . . this court has already declined to find in § 4(d) or § 4(e) [of the Natural Gas Act] an 'invincible right to raise prices subject only to a six-months delay and refund liability.' *United Gas Imp. Co. v. Callery Properties*, 382 U.S. 223, 232, 86 S. Ct. 360, 366, 15 L.Ed. 2d 284 (opinion concurring in part and dissenting in part). Section 4(d) merely requires notice to the Commission as a condition of any modification of existing rates; it provides that a 'change *cannot* be made without the proper notice to the Commission; it does not say under what circumstances a change *can* be made' [citing the *Mobile* case *supra*, emphasis in original].

Similarly, while Section 203(b) of the Communications Act had its origin in Section 6(3) of the Interstate Commerce Act and only this fact is reflected in the legislative history (see, e.g., S. Rep. No. 781, 73rd Cong. 2nd Sess. p. 4), the provisions of Section 203(b) gave the Communications Commission considerably broader authority than the Interstate Commerce Commission was granted under the prototype section in directing that the normal thirty day notice period not be followed. Section 6(3) of the Interstate Commerce Act after providing that rate changes could not be made "except after thirty days notice to the Commission and to the public" goes on to state that "the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified or modify the requirements of this Section in respect to publishing, posting and filing of tariffs. . .". Under this language it is clear the ICC can only reduce the notice period, though its authority with respect to the other requirements of the Section is not similarly circumscribed. Under 203(b) of the Communications Act, however, the FCC "may, in its discretion and for good cause shown, modify the requirements made by or under authority of this Section in particular instances or by a general order applicable to special circumstances or conditions." Accordingly, as the Commission has itself recognized in its recent notice of proposed rule making looking towards the

establishment of a normal 60-day notice period for rate increase filings,¹⁹ no restriction, other than the necessity for a showing of good cause, is placed upon the direction of any modification of the notice period. It can be lengthened or shortened, as circumstances warrant, either by general rule or specific order.

III. THE COURT HAS POWER TO REVIEW THE COMMISSION'S ACTION AND TO ORDER THAT IT TAKE STEPS TO SET ASIDE THE TELPAK RATE INCREASE.

We have shown, above, that the Commission had placed itself in a situation in which it was obligated to take available action to prevent any new Tel-pak rate from becoming effective. We deal here with the contentions of the Commission and the carrier that the Commission's action is not reviewable by this Court. We shall also demonstrate the appropriateness and availability of mandatory relief.

A. The Court's Power to Review the Commission's Action.

On motion for stay both the carrier and the Commission, arguing by analogy from cases arising under the Interstate Commerce Act, have urged that petitioners are seeking to have the Court extend the statutory suspension period beyond the three months maximum which the statute imposes upon the Commission. As we have shown above, this argument is based upon the failure to give appropriate significance to the difference between the Interstate Commerce Act and the Communications Act, resulting from the inclusion of Sections 4(i), 203(b) and 303(r) in the latter. The broad powers which these sections confer are more than sufficient to permit the Commission either to reject defective rate filings or, in appropriate circumstances, to require that a rate which has been accepted for filing not become effective until the conclusion of pending proceedings.

¹⁹ See, *Amendment of Part 61 of the Commission's Rules Relating to Tariffs and Part 1 of the Commission's Rules Relating to Evidence*, Docket No. 18703, 34 Fed. Reg. 1717 (October 17, 1969).

The Communications Commission's authority in these areas is in marked contrast to that of the Interstate Commerce Commission, which can reject a rate filing only if it fails to specify the proposed effective date, and has no power to preclude a filed rate from becoming effective at the end of the statutory suspension period. These distinctions are of significance in considering the extent to which the ICC court review precedents govern the present case, for while the carrier and Commission have given these precedents a broad sweep to which they are not entitled on their own terms, the precedents do reflect a reluctance on the part of the courts to intervene in the limited area within which the ICC can and does exercise its discretion. Because of this, the contention that this Court is, in any event, being asked to step into an area exclusively assigned to the unfettered discretion of the agency appears on the surface to be the most compelling argument advanced by the Commission and the carrier.

The argument would have force if the issue in this case involved only a review of an exercise of an agency's statutory discretion to suspend or not to suspend a rate filing. However, the Commission did in fact exercise its discretion to suspend; and no one is requesting this Court to review that exercise of discretion. What this Court is being asked to do is to determine whether the Commission had—as the petitioners have argued throughout—powers under Sections 4(i), 203(b) and 303(r) to provide the carrier's customers with protection in addition to the statutory three-month suspension and whether the failure to exercise those powers was contrary to law in view of the denial of the expedited hearing the carrier's revenue situation and its failure to comply with the procedures established as conditions precedent to any new filing. So viewed, all that this Court is being asked is to exercise the normal degree of review the Commission's conduct of its proceedings.

This becomes clear when we examine the principal case relied upon by the Commission and the carriers, *Arrow Transportation Company v. Southern Railway Co.*, 372 U.S. 658. *Arrow* does not involve any question of the propriety of the Interstate Commerce Commission's exercise or failure to exercise any

claimed authority. On the contrary in *Arrow*, the Commission had suspended the rate change in question for the full seven months period authorized by Section 15(7) of the Interstate Commerce Act. Moreover, as is its uniform practice, it had entered into an immediate hearing as to its validity. When the Commission recognized it would not be able to complete the proceeding within the seven month suspension period, it requested the railroad to postpone making the rate effective, which it voluntarily agreed to do for an additional five months. After the railroad announced it would not voluntarily extend the suspension period beyond this point, the parties opposing the rate change, *without seeking any further relief from the Commission*, attempted to persuade a federal district court to enjoin the rate change as an exercise of its general equity powers.

The Supreme Court in *Arrow* affirmed the lower court's conclusions that no such independent equitable power existed. While a number of the district courts had exercised such powers prior to the adoption of the provisions of the Interstate Commerce Act authorizing the Commission to suspend rate changes, the Court held that Congress, in giving the suspension power to the Commission, had intended to deprive the courts of any independent authority to enjoin carrier rate changes.

Since there was no suggestion in *Arrow* that the ICC, in the absence of any authority analogous to Section 4(i) of the Communications Act, could have compelled the railroad to refrain from making the rate effective, no question was presented of the jurisdiction of a reviewing court to pass upon the exercise of Commission discretion in this area, or to take effective action to remedy an abuse of discretion. The majority opinion in *Arrow* does, however, note that if the courts retained independent authority to enjoin a rate change its determination "would seem to require at least some consideration of the applicant's claim that the carrier's proposed rates are unreasonable." (372 U.S. at 669-670) This, the Court held, would involve judicial intrusion into the administrative domain: "If an independent appraisal of the reasonableness of the rates might be made for the purpose of deciding applications for injunctive relief,

Congress would have failed to correct the situation so hazardous to uniformity which prompted its decision to vest the suspension power in the Commission.²⁰ Moreover, such a procedure would permit a single judge to pass before final Commission action upon the question of reasonableness of a rate, which the statute expressly entrusts only to a court of three judges reviewing the Commission's completed task." *Id.* at 670-671.

In this context the Court noted that the unwillingness of courts to substitute their judgment for that of the agency as to the probable reasonableness of a rate not yet subjected to the full hearing process "explain[s] why courts consistently decline to suspend rates when the Commission has refused to do so, or to set aside an interim suspension order of the Commission." *Id.* at 670. This language does not merely fail to suggest that reviewing courts lack jurisdiction to act regardless of the circumstances. It is specifically accompanied by footnote 21 which refers, without disapproval, to the line of cases where reviewing courts had enjoined rates which the ICC had first suspended, but then permitted to become effective without adequate explanation of its change of mind.²¹ See, in addition to the cases cited by the Court, *Long Island Railroad Co. v. United States*, 140 F. Supp. 823 (S.D.N.Y. 1956); *Dixie Carriers, Inc. v. United States*, 143 F. Supp. 844 (D.C.S.D. Tex. 1956); *Atlantic Coast Line RR. Co. v. United States*, 173 F. Supp. 871 (D.C.S.D. Va. 1958).

²⁰ The Court had previously pointed out that the ICC had advocated the suspension procedure to avoid situations where different district courts had reached different conclusions as to whether rates should or should not be enjoined, and their orders had not applied uniformly to the various shippers involved. See 372 U.S. at 663-664.

²¹ The footnote reads: "See, e.g., *Carlsen v. United States*, 107 F. Supp. 398 (D.C.S.D. N.Y.); *Bison S.S. Corp. v. United States*, 182 F. Supp. 63 (D.C.N.D. Ohio); *Luckenbach S.S. Co. v. United States*, 179 F. Supp. 605 (D.C./D.Del.). But cf. *Amarillo-Borger Express, Inc. v. United States*, 138 F.Supp. 411 (D.C. N.D.Tex.), vacated as moot, 352 U.S. 1028, 77 S.Ct. 594, 1 L.Ed. 2d 598; *Seatrains Lines, Inc. v. United States*, 168 F. Supp. 819 (D.C.S.D. N.Y.). Compare generally Goodman, *The History and Scope of Federal Power to Delay Changes in Transportation Rates*, 27 I.C.C. Prac. J. 245 (1959), with Brooks and Daily, *The Commission's Power of Suspension and Judicial Review Thereof*, *id.*, 589 (1960)."

In any event, consideration of the merits of the present case would not lead this court into premature consideration of the reasonableness of the new Telpak rate, for the Commission has made it clear that it has made no advance judgment as to the probable validity or invalidity of the rate. Rather, it felt "compelled" to suspend the increase for a three-month period because of its magnitude, and the facts that if followed another major increase in little more than a year, and Telpak users had not yet been given an opportunity to demonstrate that the original Telpak rates were compensatory and competitively necessary (J.A. 563). The issue here is solely whether the situation with respect to the latest Telpak increase was such as to obligate the Commission to take further action within its authority.

Nor do we have presented here the problem that Judge Friendly believed called for judicial restraint (but *not* for a rejection of all jurisdiction) in his opinion in *Long Island Railroad Company v. United States*, 193 F.Supp. 795 (D.C.S.D.N.Y. 1961). The issue in that case was whether a three judge district court could set aside ICC action suspending a rate and order the rate to become effective. Judge Friendly pointed out that since the suspension period is limited, litigation as to whether the suspension should have been authorized "may seriously interfere with the administrative agency's effective performance of functions where speed is of the essence," even if the suspension remained in effect during the court litigation, progress in the administrative proceeding would be likely to be hampered by the court review so as to make impossible its completion prior to the expiration of the suspension period (193 F. Supp. at 799). It was in this context that he would have limited judicial intervention in such cases to situations where the suspension is "plainly without statutory authority or violates a clear statutory command" *Id.* at 800. And his example of the latter situation—a suspension by the ICC for more than the seven months permitted by Section 15(7) of the Interstate Commerce Act—obviously must be read in the light of the absence of any authority available to the ICC equivalent to that granted the Communications Commission under Sections 4(i), 303(r) or 203(b).

Of course, if an agency lacks power to reject a filed rate or to preclude its effectuation, then a reviewing court cannot order it to do so any more than it could order such action on its own. This is the lesson of *Arrow* which we do not dispute. Here, however, the Communications Commission possessed plenary power to act. And, since the Commission had the power to preclude the new Telpak rates from becoming effective, this Court has power to determine whether it should have done so in circumstances where the Commission has failed to provide the required expedited hearing on a previous rate increase and has so structured the proceeding on the new increase that the hearing thereon cannot be commenced—to say nothing of being completed—until long after the normal suspension period has expired.

It is meaningless to assert that no reviewing court has previously acted to defer a rate filing from becoming effective beyond the maximum statutory period for suspension. To the best of our knowledge the issue has never been raised; it could not be under the Interstate Commerce Act cases since there is admittedly no authority on the part of the Commission to reject a filing or order the deferral of its effectiveness. Nor would action by the court here have the effect of upsetting the statutory compromise embodied in Section 204 of the Act between the desire of a carrier to put revenue producing rate changes into effect as soon as possible, and the interests of users, in the light of the inadequacy of the refund or damage remedies, to defer the effectiveness of such changes until they have been found to meet the Act's standards. For here, as a result of its offset agreement, the carrier stands to gain nothing by putting the new rates into effect prior to a determination of their validity. However, as a result of the Commission's failure to provide the expedited hearing on the rate increase mandated by the Act, the balancing of interests contemplated by the statute can only be restored by action of this Court.

B. The Finality of the Commission's Orders.

It is clear that the Commission's Orders under review here have finally and conclusively denied petitioners the right to be free of the obligation to pay

the increased rates for Telpak pending determination of their validity. Nevertheless the ghost of the "negative order doctrine," presumably buried in *Rochester Telephone Corp. v. United States*, 307 U.S. 125 (1939), stalks this case, as it has many other orders which were not the "very last order" in an administrative proceeding.

It can no longer be disputed that an administrative order need not be the last agency action in a proceeding to possess the necessary finality for review and that instead "administrative orders are ordinarily reviewable where they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." *Isbrandtsen Co. v. United States*, 93 U.S. App. D.C. 293, 297, 211 F.2d 51, 55, cert. denied sub nom., 347 U.S. 990 (1954); *TransPacific Freight Conference of Japan v. Federal Maritime Board*, 112 U.S. App. D.C. 290, 302 F.2d 875, 877 (1962); *Bethesda Chevy Chase Broadcasters Inc. v. Federal Communications Commission*, 128 U.S. App. D.C. 185, 385 F.2d 967 (1968). Here it is clear that the Commission by its action and inaction has irrevocably fixed the legal relationship between the carrier and its customers which will be controlling for the indefinite period required to bring the proceeding to decision and has imposed an obligation on the customers to pay substantially higher rates during this period. But it is suggested that in view of the accounting order plus possible claims for damages, the Telpak users are afforded sufficient protection against the possibility that the increases will ultimately be found to be invalid in whole or in part to preclude any review of the Commission's action.

In our pleadings to the Commission and in this Court on petition for interlocutory relief, AIA and the other Telpak users showed that we would suffer irreparable injury from the effectuation of the latest Telpak increases of an extent and nature which no conceivable refund or damage remedy could obviate. It is, however, not necessary for this Court to review the factual basis for these claims, since it is by now well established that "interlocutory" agency orders suspending, or refusing to suspend, or rejecting, or refusing to reject, rate change filings are final for purposes of Court review. See *Memphis Light, Gas &*

Water Div. v. Federal Power Commission, 102 U.S. App. D.C. 77, 250 F.2d 402, 404-405 (1957), *reversed on other grounds, sub nom.*, 358 U.S. 103 (1958); *Tyler Gas Service Co. v. Federal Power Commission*, 101 U.S. App. D.C. 184, 247 F.2d 590 (1957); *Cities Service Gas Company v. Federal Power Commission*, 255 F.2d 860, 862-863 (10th Cir., 1968); *Mobile Gas Service Corp. v. Federal Power Commission*, 215 F.2d 883, 885 (3rd Cir., 1954), *affirmed sub nom.*, 350 U.S. 332 (1956); *cf.*, *Isbrandtsen Co. v. United States*, 93 U.S. App. D.C. 293, 211 F.2d 51, *certiorari denied* 347 U.S. 990; *City of Los Angeles v. Federal Maritime Commission*, 128 U.S. App. D.C. 326, 388 F.2d 582 (1967).

C. The Court's Authority to Grant the Requested Relief.

If, as we believe we have demonstrated, the Commission in the present case failed to meet its obligations under the Communications Act in refusing to reject or postpone the effectiveness of the latest Telpak increase, there can be no doubt that this Court has authority upon review to direct it to do so.

Section 2342 of Title 28 of the U.S. Code, which sets forth the jurisdiction of the courts of appeal in actions to review final orders of the Federal Communications Commission made reviewable by Section 402(a) of the Communications Act, provides that the Court "has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or determine the validity" of the Commission action involved. This language is sufficiently broad to authorize the Court, where it finds that Commission action has been unlawfully withheld, to require the Commission to so act. And any conceivable question of the Court's authority to order mandatory relief in appropriate circumstances is set at rest by the provisions of the Administrative Procedure Act, authorizing reviewing courts to "compel agency action unlawfully withheld or unreasonably delayed," (5 U.S.C. § 706), and the "all writs" provisions of Title 28 U.S.C. § 1651.²²

²² The fact that the increased rates involved in the latest filing are now in effect does not preclude this Court from ordering the Commission to take action now to direct AT&T
(Cont'd.)

The right of a reviewing court to order mandatory relief in circumstances like the present is well settled. Courts operating pursuant to equivalent review jurisdiction have frequently ordered rate making agencies to reject or suspend rate filings where the court concluded the agency's failure to do so was unlawful. Thus, in *United Gas Pipeline Co. v. Mobile Gas Service Corp.*, *supra*, the Supreme Court affirmed action by the court of appeals which had "reversed the Commission's order, directed it to reject United's filing of the new schedule insofar as it purported to increase the rate in question and held Mobile entitled to a return of the amounts paid in excess of the contract rate." (350 U.S. at 337, *affirming* 215 F.2d 883 (3rd Cir., 1954)). See also to the same effect, *Sierra Pacific Power Company v. Federal Power Commission*, 96 U.S. App. D.C. 140, 223 F.2d 605, *affirmed*, 350 U.S. 348 (1956); *Memphis Light, Gas & Water Division v. Federal Power Commission*, 102 U.S. App. D.C. 77, 250 F.2d 402 (1957), *reversed on other grounds, sub nom.* 358 U.S. 103 (1958). The courts took such action despite the fact that both the Natural Gas Act (15 U.S.C. § 717(r)) and the Federal Power Act (16 U.S.C. § 825(1)) in terms only authorize the Court to "affirm, modify, or set aside such order in whole or part."

Similarly, in those cases where three-judge district courts have held that the Interstate Commerce Commission improperly revoked the suspension of a rate change they have expressly directed the Interstate Commerce Commission to reinstate the vacated suspension. See, the *Amarillo-Borger*, *Long Island Railroad*, *Dixie Carriers*, and *Seatrains* cases, *supra*.

Ftn. 22 (Cont'd.)

to return its Telpak service rates to the level in existence prior to February 1, 1970, and to make refunds for the overcharges collected since February 1, 1970. See *United Gas Pipeline Co. v. Mobile Gas Corp.*, *supra*, 350 U.S. at 347. While this would mean that AT&T's total revenues between February 1, 1970, and the effective date of reversion to the earlier rates would be less than it might have enjoyed except for the offset filing, both AT&T and the Commission have publicly proclaimed that they would not later assert any rights arising out of the offset filings (21 F.C.C.2d 1, 3; J.A. 726-727) and AT&T has, in any event, benefitted during the interim by the 50% reduction in the federal income tax surcharge which the Commission chose to ignore in the surveillance proceedings leading to the January 1, 1970, reduction in AT&T's rates (J.A. 582-583).

CONCLUSION

The Commission in this case failed to take the available action necessary to afford Telpak users the prompt hearing on the rate increases for that service required by the Act. This Court can and should therefore direct the Commission to order AT&T to set aside the latest increase and to refund the excess revenues it has collected thereunder since February 1, 1970.

Respectfully submitted,

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March 30, 1970

APPENDIX A

STATUTE INVOLVED

Communications Act of 1934, as amended,
47 U.S.C. § 151, *et seq.*

Section 4(i); 47 U.S.C. § 154(i)

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act as may be necessary in the execution of its functions.

Section 203(b); 47 U.S.C. § 203(b)

(b) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions.

Section 204; 47 U.S.C. § 204

Whenever there is filed with the Commission any new charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, but not for a longer period than three months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an

order made within the period of the suspension, the proposed change of charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased charges as by its decision shall be found not justified. At any hearing involving a charge increased or sought to be increased, after the organization of the Commission, the burden of proof to show that the increased charge, or proposed increased charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Section 205(a); 47 U.S.C. § 205(a)

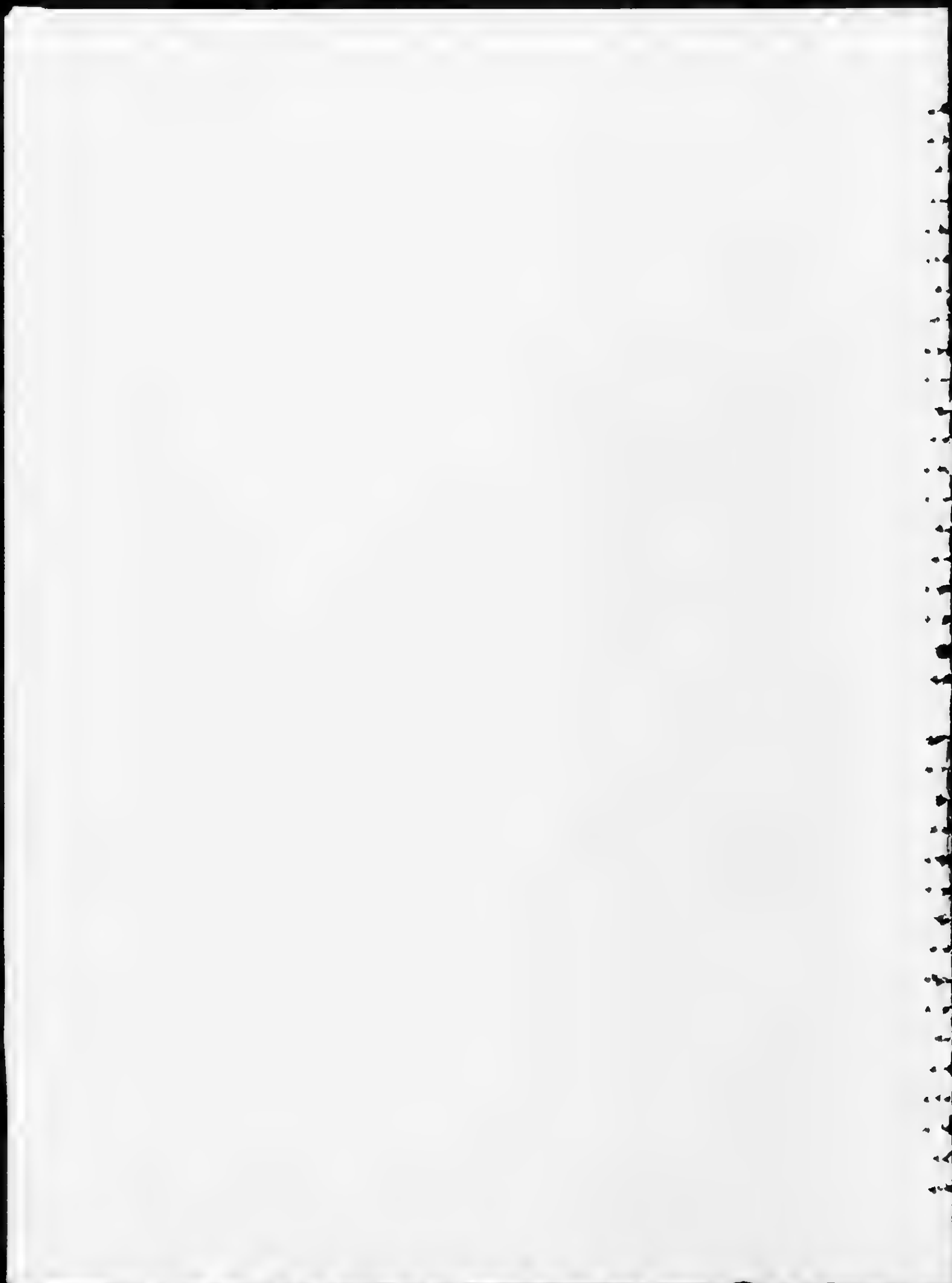
(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed or in excess of the maximum or less than the minimum so prescribed, as the case

may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Section 303(r); 47 U.S.C. § 303(r)

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.



APPENDIX B

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 70-191
43464

In the Matter of)

American Telephone and Telegraph Company)
and the Associated Bell System Companies)

DOCKET NO. 16258

Charges for Interstate and Foreign Com-)
munication Service)

American Telephone and Telegraph Company)
Long Lines Department)

DOCKET NO. 18128

Revisions of Tariff F.C.C. No. 260, Private)
Line Services, Series 5000 (Telpak))

American Telephone and Telegraph Company)

DOCKET NO. 18684

Revision of American Telephone and Telegraph)
Company Tariff F. C. C. No. 260, Series 6000)
and 7000 Channels (Program Transmission Services))

American Telephone and Telegraph Company)

DOCKET NO. 18718

Revision of American Telephone and Telegraph)
Company Tariff F.C.C. No. 133, Teletypewriter)
Exchange Service)

MEMORANDUM OPINION AND ORDER

Adopted: February 18, 1970 ; Released: February 24, 1970

By the Commission: Commissioner Johnson dissenting.

1. Pursuant to paragraph (5) (b) of the procedural recommendations of the Statement of Ratemaking Principles and Factors in Docket No. 16258, Phase 1B, which appears in Appendix A of our Order of July 29, 1969 (18 F.C.C. 2d 761 @ 768), the Chief of the Common Carrier Bureau has recommended that Phase 1B of Docket No. 16258 be terminated without opinion on the merits by the Commission. In so doing, the Chief of the Common Carrier Bureau has advised the Commission that: A.T.&T. has filed new studies and made rate adjustments which it alleges comply with the Statement of Ratemaking Principles and Factors; the hearings in Docket Nos. 18128, 18684 and 18718 will determine whether they in fact comply with said Statement of Ratemaking Principles and Factors; and, prior to a full hearing, he takes no position thereon. Wa

have previously approved these procedures and accordingly will follow the recommendation of the Chief, Common Carrier Bureau.

2. In that Order we took note of the statement agreed to by the parties. We said:

9. The record developed in Docket 16258 provides an examination of pricing principles which we believe is of unprecedented scope in regulatory proceedings. It affords a sound basis upon which to determine theoretical ratemaking principles which can then be tested and applied in the context of ratemaking proceedings dealing with respondents' rate structure and the prices to be charged for their specific services. . . . Implementation of the stipulation and development of such needed data will substantially benefit from the extensive testimony and cross-examination which occurred in docket 16258, and will permit us to proceed to the testing of specific ratemaking principles in the light of the issues in the Telpak-Private Line case (docket 18128), the new program transmission rates, and such additional issues that may arise. (18 F.C.C. 2d 761, 764)

We incorporated the record of Phase 1B into Docket 18128, noting that program and video transmission services had been excluded from that Docket and stated:

The same ratemaking principles that will be further considered in docket 18128 will be involved in connection with the new program transmission rates. When those new rates are filed in tariffs, we will make appropriate provision for their consideration in the light of the same ratemaking principles. (18 F.C.C. 2d 761, 765)

At that time no adjustment was anticipated in TWX rates which would require formal hearing. Since then, both Docket Nos. 18684 and 18718 have been instituted involving program and TWX rates respectively.

3. Consistent with our Order of July 29, 1969, we will incorporate the record of Phase 1B (Vols. 77-179 of the transcript and related exhibits, plus staff exhibits 1 through 8 and 37) in Dockets 18684 and 18718, "in order that we may then have the full benefit of the extensive and informative record already developed and to prevent any duplication or repetition thereof in the consideration of the specific rate issues involved in" those dockets. In the course of the hearings therein, it is expected that appropriate disposition will

be made of any related matters still pending in Docket 16258, such as the receipt into evidence of certain exhibits (FCC staff exhibits 48 and 53 through 55), and corrections to Networks exhibits 6 and 6A. (Tr. 21176)

4. Phase 1B of Docket 16258 dealt with the issue of the appropriate ratemaking principles and factors which should govern the relationship among the rate levels for each of respondents' principal services. As stated above, we are now terminating Phase 1B without decision on this issue in order to determine the practical effect of whatever principles are adopted with reference to specific rate problems. While the Commission has not approved the Statement of Ratemaking Principles and Factors which were agreed to by the parties in Docket 16258, the statement contemplates that the total interstate test period historical costs should be allocated among the various service categories in such a way as to estimate the costs which have been incurred for the provision of each service category.

Such allocation may be useful to determine whether, during the test period, any service has burdened any other service. In the event it is determined that one service has burdened any other service, we should be in a position to order an elimination of the causes of such burden. Accordingly, we will include this issue in Dockets 18128, 18684 and 18718. Thus, it is contemplated that as a result of these further hearings, a determination will be made with respect to the appropriate rate level for each of Bell's major categories of service.

5. Accordingly, IT IS ORDERED, that:

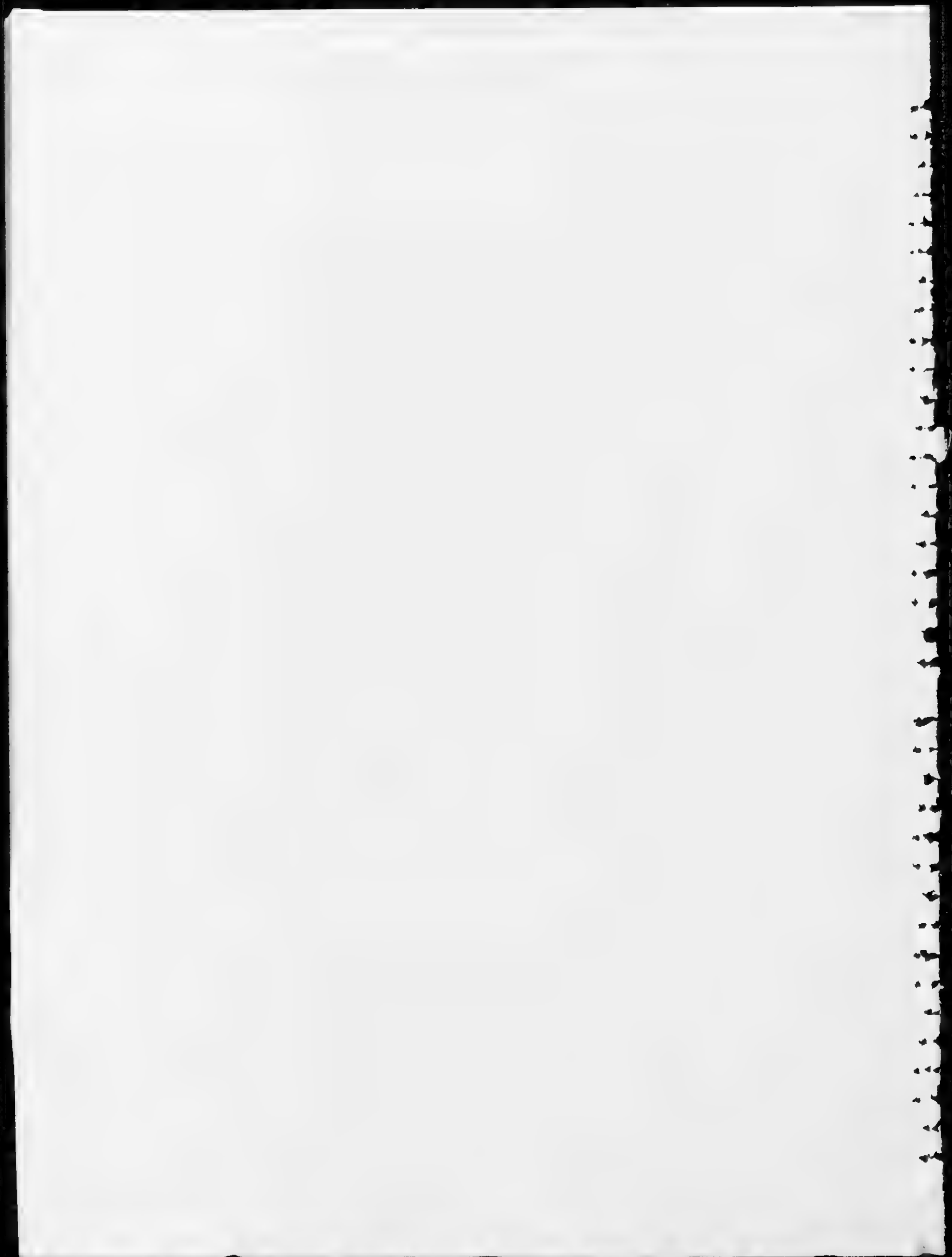
1. Phase 1B of Docket 16258 is hereby terminated.
2. Further proceedings in Docket 16258 will be subject to further order.
3. The record of Phase 1B of Docket 16258, consisting of volumes 77 through 179 of the transcript, and related exhibits, including staff exhibits 1 through 8, and 37, is incorporated by reference into Dockets Nos. 18684 and 18718. Any necessary rulings with respect to such exhibits, as noted in paragraph 3 above, shall be made as required.
4. In addition to the issues already specified in Dockets 18128, 18684 and 18718, there is hereby added to each of those Dockets the following issues:
 - (a) Whether the rate levels for (1) message toll telephone service, (2) WATS, (3) private line telephone grade service, (4) private line tele-

graph grade service, (5) audio and video program transmission services, (6) TWX and (7) all other service are or will be just and reasonable within the meaning of Section 201(b) of the Communications Act of 1934.

- (b) Whether the rate levels for the above-mentioned services will subject any person or class of persons to unjust or unreasonable discrimination, or give any undue or unreasonable preference or advantage to any person, class of persons or locality, or subject any person, class of persons or locality to any undue or unreasonable prejudice or disadvantage within the meaning of Section 202(a) of the Communications Act of 1934.
- (c) Whether the Commission should prescribe just and reasonable rate levels with respect to any or all of the above-mentioned services placed at issue by this order, and, if so, what rate levels should be prescribed.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary



BRIEF FOR RESPONDENT
FEDERAL COMMUNICATIONS COMMISSION

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE ASSOCIATED PRESS, No. 23,833,
Petitioner,
AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC.,
No. 23,836,
Petitioner,
AIR TRANSPORT ASSOCIATION OF AMERICA, UNITED AIR LINES, INC.,
EASTERN AIR LINES, INC., and EMERY AIR FREIGHT CORPORATION,
No. 23,839,
Petitioners,
AMERICAN TRUCKING ASSOCIATIONS, INC., No. 23,841,
Petitioner,
AERONAUTICAL RADIO, INC., No. 23,842,
Petitioner,
NATIONAL ASSOCIATION OF MOTOR BUS OWNERS, No. 23,843,
Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,
THE WESTERN UNION TELEGRAPH CO.,
AMERICAN TELEPHONE AND TELEGRAPH CO.,
BETHLEHEM STEEL CORPORATION, et al.,
Intervenors.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

United States Court of Appeals
for the District of Columbia Circuit

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IN THE UNITED STATES COURT OF APPEALS
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THE ASSOCIATED PRESS, No. 23,833,
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EASTERN AIR LINES, INC., and
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Petitioner,

AERONAUTICAL RADIO, INC., No. 23,842,
Petitioner,

NATIONAL ASSOCIATION OF MOTOR BUS OWNERS, No. 23,843,
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ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR RESPONDENT
FEDERAL COMMUNICATIONS COMMISSION

STATEMENT OF ISSUES PRESENTED *

I. Whether the Commission acted reasonably when pursuant to Section 204 of the Communications Act of 1934 (47 U.S.C. 204) it provided for a three month suspension and accounting, instead of summarily rejecting the tariff pending its investigation of the lawfulness of Telpak tariff revisions in light of petitioners' allegations that:

A. The carrier A.T.&T. failed to make a prima facie showing of the tariff's lawfulness.

B. The rates amount to an illegal pyramiding.

C. A.T.&T. has violated the parties' "Statement of Rate Making Principles and Factors."

D. The Commission has through previous decisions prejudged the outcome of the investigation before its initiation.

II. Whether an order of the Commission in the above context is a final reviewable order.

*/ This case has not previously been before this Court.

COUNTERSTATEMENT OF THE CASE

The eight petitioners in this proceeding^{1/} seek review of that portion of a Federal Communications Commission Memorandum Opinion and Order adopted October 29, 1969 (A. 558) which designated for hearing and investigation the lawfulness of a revision to the Telpak (or series 5000) portions of A.T.&T. Tariff 260 submitted by American Telephone and Telegraph. The tariff proposes: (1) an increase in rates for Telpak C and D base capacities, (2) a change from six (three in the case of 150 baud service) to two in the number of telegraph channels which will be equivalent to a voice grade channel, and (3) an increase in rates for certain service terminals. In addition to ordering an investigation and hearing, the Commission, acting pursuant to Section 204 of the Communications Act of 1934, 47 U.S.C. 204, suspended the effective date of

^{1/} Petitioners are the Associated Press (AP), Aerospace Industries Association of America (Aerospace), Air Transport Association of America, United Air Lines, Inc., Eastern Air Lines, Emery Air Freight Corporation, Aeronautical Radio, Inc., and the National Association of Motor Bus Owners (NAMBO). The American Trucking Association also filed a petition for review on January 5, 1970, and along with the above petitioners sought and was denied injunctive relief by this Court on January 29, 1970. American Trucking Association has not filed a brief within the time provided by F.R.A.P. Rule 30(a) and therefore pursuant to Rule 30(c) we hereby move for dismissal of its petition.

these changes for the full three month statutory period (from November 1, 1969 until February 1, 1970) and provided that thereafter A.T.&T. must keep accurate account of all amounts received by reason of the increased rates pending completion of the hearing.^{2/} (The text of Section 204 is appended.) After the above petitions for review were filed with the Court, the Commission issued an additional Memorandum Opinion and Order (A. 724)^{3/} disposing of various pending petitions and motions for reconsideration which had been filed by some of the petitioners herein. The relief requested was denied in all respects.

Essentially the Commission orders under review simply institute an investigation into the lawfulness of a recent revision of the Telpak tariff. The Telpak classification was initiated in 1961, however, and a full factual presentation of the present case requires some discussion of earlier proceedings involving the tariff.

^{2/} The same order of the Commission also considered (paragraphs 2, 3, 4, 5, 7, and 8) the experimental series 11,000 proposed by A.T.&T. None of the parties seeks review of the portion of the order dealing with series 11,000.

^{3/} The Commission's decisions are officially reported at 20 F.C.C. 2d 383 and 21 F.C.C. 2d 1.

A. The First Telpak Proceeding.

Telpak is a private line service which was initiated by A.T.&T. in 1961 for customers with large needs for telephone, telegraph, data and other forms of private line communications. It afforded these large users a volume service at reduced rates, and was allegedly offered to meet the competition of private microwave systems.^{4/} At its inception the tariff contained four subdivisions, Telpak A, B, C, and D. The four categories differed only in number of private line channels involved. The Commission, after an investigatory hearing concluded in 1965, found the service to be discriminatory because it offered a bulk rate discount for large users although the cost of servicing users was not affected by volume. Telpak, Tentative Decision, 38 F.C.C. 370, adopted 37 F.C.C. 1111; aff'd sub nom. American Trucking Assn., Inc. v. F.C.C., 126 U.S. App. D.C. 236, 377 F.2d 121 (1966), cert. denied, 386 U.S. 942 (1967). The Commission also found there was no justification on the basis of

^{4/} It first became feasible for large communications users to build their own private microwave systems in 1960 when the Commission allocated frequencies for such use by private firms. See Allocation of Frequencies above 890 Mc, 27 F.C.C. 359, 29 F.C.C. 825 (1960).

competitive necessity for the A and B Telpak service classifications inasmuch as it would not be practical for a private line customer to construct his own microwave system if he needed the number of lines offered under A or B. While apparent competitive necessity for the Telpak C and D service was tentatively found, the Commission concluded that the rates had not been shown to be compensatory. On this point the decision stated:

There is apparent justification for Telpak C and D Classification in terms of meeting competition from private microwave systems having channel capacities comparable to those offered by such Telpak classifications. However, we are unable to determine on this record that the rates for Telpak C and D classifications are compensatory in relation to the costs of furnishing the services offered thereunder and, therefore, are unable to find that the other users of A.T.&T. services will benefit and not be burdened by the application of such rates. (37 F.C.C. 1118) 5/

5/ Telpak C offers the equivalent of 60 voice grade channels while Telpak D is a 240 channel offering. The Telpak rate structure contains two basic charges, one for base capacity on a per airline mile per month basis and the other for channel terminals which varies with the type of terminal equipment utilized (e.g., telephone, teletypewriter, data terminal equipment). The following figures, reflecting what this Court termed a "startling disparity" (126 U.S. App. D.C. at 241, 377 F.2d at 126), show the difference between individual private line rates and the Telpak rates specified in the original tariff:

	<u>Individual Private Lines</u>	<u>Telpak</u>
(C) 60 Voice Grade Channels	\$18,900	\$ 4,300
(D) 240 Voice Grade Channels	75,600	11,700

The discrimination found between Telpak A and B and regular private line rates was ordered eliminated. The record was reopened, however, largely at the request of Telpak C and D customers so that further evidence could be taken on whether the C and D classifications were compensatory. In this connection the Commission noted that A.T.&T. was conducting cost studies of various services, including private line, for the then pending Domestic Telegraph Investigation (Docket No. 14650) and that "it should be possible to develop from these cost studies more positive data relating to the cost of furnishing Telpak C and D." 37 F.C.C. at 1112, 1118.

B. The General Investigation of A.T.&T.'s Charges.

The A.T.&T. study referred to above undertook to determine for the 12 months ending August 31, 1964, the investment, expenses and revenues associated with each of 7 different classes of communication service, making up the Bell System's total interstate operations, i.e. message toll telephone service, wide area telephone service (WATS), teletypewriter exchange service (TWX), private line telephone, private line telegraph, Telpak, and all other. The results of the study were presented by A.T.&T. for the record in

Docket No. 14650 on September 10, 1965. They disclosed wide variations in earnings among the various services. At one extreme, message toll telephone and WATS were earning at the rates of 10% and 10.2% respectively, while Telpak, at the other extreme, was earning at the rate of .3%. American Telephone & Telegraph Co., 2 F.C.C. 2d 871.^{6/}

These results, revealing so wide a disparity in the levels of earnings among the various classes of service, was a major reason for the Commission's action in October of 1965 (American Telephone & Telegraph Co., supra) initiating an investigation into the lawfulness of A.T.&T.'s charges for interstate and foreign communications services. (Docket No. 16258). That order also raised issues relating to the relevant ratemaking principles and factors which should control in the distribution of the A.T.&T. total revenue requirements among its principal rate classifications.

With the initiation of this proceeding the level of rates for the Telpak service became significant with regard to two issues: the more specific and detailed rate issue as to whether the service was compensatory and the general question of its contribution to the total interstate revenue requirements of A.T.&T.

^{6/} The Commission found it "significant that message toll telephone and WATS services, with the highest level of earnings, account for 85% of total interstate revenues." Id.

In order that the Commission might resolve these questions A.T.&T. was asked to submit additional cost data with regard to the Telpak service along with any proposed adjustments in the rates which might be reflected by the study. At the same time it enlarged the scope of the general investigation (Docket No. 16258) to include Telpak charges as well as those applicable to other services. A.T.&T., 7 F.C.C. 2d 30 and 31 F.R. 15104 (1966). Pursuant to these orders, A.T.&T. submitted on January 9, 1967, cost data and new rate proposals representing the same levels as those now challenged by petitioners.^{7/}

7/ The following table compares the rates applicable at that time with the proposed new schedule:

	<u>Applicable Rate</u>	<u>Proposed Rate</u>
<u>Interexchange Channels--per airline mile</u>		
Telpak C Base Capacity	\$25.00	\$30.00
Telpak D Base Capacity	\$45.00	\$85.00
<u>Channel Terminals--per terminal</u>		
Voice or teletypewriter:		
First Terminal	\$15.00	\$35.00
Additional	5.00	15.00
Telephone/Telegraph Equivalency	1 to 12	1 to 2

Thirteen months later, on February 1, 1968, tariff revisions were filed embodying these proposed increases in the Telpak rates. Prior to their becoming effective, however, A.T.&T. asked special permission to withdraw them largely because of the customers' complaints that the impact would be substantial and that in some cases the customers would be unable to make required adjustments by the proposed effective date of April 1, 1969. A.T.&T. stated it would file a new set of revisions which would provide for a lesser increase and would serve as an intermediate step in achieving the level being withdrawn. On March 14, 1968, the Commission granted A.T.&T.'s request. Special Permission No. 5258.

A.T.&T. then filed a new tariff initiating the intermediate step of its rate increase to become effective June 1, 1968.^{8/} The Commission suspended the rates for the full three month statutory period, thus making them effective on September 1, 1968. At the same time the Commission also

^{8/} In brief the new tariff reduced Telpak C from the originally proposed \$30.00 to \$28.00; and Telpak D from \$85.00 to \$60.00. Service terminal charges were lowered from \$35.00 to \$25.00 and the telephone/telegraph equivalency ratio was set at 1 to 6. See note 7, supra.

instituted a hearing into their lawfulness because of the still unresolved question, stemming from the original Telpak proceeding, as to the compensatory nature of the rates (see pp. 6-7, supra). In discussing the impact of the new rates on the users, the Commission reminded them that they "had been on notice since 1961 that Telpak rates presented substantial questions of lawfulness requiring formal investigation and that significant increases in these rates could result." 33 F.R. 5900 (A. 170, 172). Furthermore, the Commission explained that "the users should henceforth govern themselves accordingly, and their communications budgets should be prepared with this contingency in mind." 33 F.R. 5900.

The hearing on the rate increases was deferred by the Commission in an Opinion adopted July 10, 1968, in which it explained that proper consideration of the Telpak rates was dependent on the result of two proceedings already being conducted. 13 F.C.C. 2d 853. In the first of these proceedings the Commission was considering whether competitive or other valid considerations justified the pricing discrimination existing in the Telpak offering; and, if so, whether A.T.&T.'s existing or proposed rates for Telpak would make an appropriate contribution to A.T.&T.'s total interstate revenue requirements. This pending consideration with respect to the revenue objectives

appropriate to Telpak and other A.T.&T. services was, in the Commission's opinion, "of threshold essentiality to a determination of the reasonableness and lawfulness of the specific rates and rate relationships within the individual rates structure." 13 F.C.C. 2d 856.

The other proceeding involved the provision in the Telpak tariff which permits certain classes of private line customers to combine and share the use of lines in order to take advantage of the discounted Telpak offering.^{9/} The Commission explained that resolution of the lawfulness questions raised with regard to the sharing aspect of the Telpak service "may have an effect upon the market for Telpak services on the basis of which [A.T.&T. has] calculated their costs of furnishing such services, which costs have been presented by A.T.&T. in Docket No. 16258, in purported justification of their proposed

^{9/} Both A.T.&T. and Western Union in their Telpak tariff offerings have provisions which permit shared use of Telpak facilities by pipe line companies, railroad companies, other rate regulated common or contract carriers or public utilities, non-profit communications organizations of such companies and Federal, state and local government agencies. An investigation of these Telpak tariff provisions was begun in 1967 (Docket No. 17547) to determine the lawfulness of the present sharing provisions and whether and to what degree the provisions should be broadened. This proceeding has now been concluded and on June 18, 1970, the Commission issued a Decision directing that the sharing provision be extended to all private line users. Telpak Sharing, FCC 70-619.

revised Telpak rates. This, in turn, could have a substantial impact on the overall level and revenue yield of Telpak rates as well as the propriety of the internal rate components of the Telpak schedule." 13 F.C.C. 2d 856.

Although some of the petitioners urged that the specific questions raised by the intermediate rise in the Telpak rates should be considered in the general investigation of A.T.&T. rates, the Commission concluded that such a consolidation would defeat the objectives of the general proceeding by encumbering it with the separable problem of examining "the propriety of the internal design or detailed components of the rate structure of a particular class of service." 13 F.C.C. 2d at 855.

In deferring the hearing the Commission, pursuant to Section 204 of the Communications Act, 47 U.S.C. 204, instituted an accounting order and directed the hearing examiner in the general rate investigation of all A.T.&T. services "to take all feasible measures to achieve the earliest closing of the evidentiary record" so that a conclusion could be reached on "proper rate making principles and factors." 13 F.C.C. 2d at 857. Thereafter, the parties in the general rate investigation, along with members of the Commission staff, reached agreement on a

"Statement of Ratemaking Principles and Factors." 18 F.C.C. 2d 761. (A. 214-226). The "Statement" deals with both substance and procedure and, in effect, it sets forth a set of principles and accompanying procedures for applying the principles in specific ratemaking proceedings.

The Commission on July 29, 1969, reviewed the "Statement" solely for the purpose of determining whether the implementation might facilitate the determination of appropriate rate making principles. After reviewing the evidence presented and the issues considered in the general rate making investigation, the Commission concluded that the "effective testing of the complex economic theories of costing and pricing which have been advanced . . . can best be accomplished by relating the principles advocated to specific rate proposals." 18 F.C.C. 2d 761, 763. The Commission then incorporated the relevant pricing and costing evidence submitted in the general investigation into the deferred proceeding investigating the Telpak rate rise.

C. The Telpak Tariff Provisions Challenged in this Proceeding.

On October 1, 1969, A.T.&T. filed the second step of the Telpak rate rise, bringing the rates to the level it proposed initially in January, 1967.^{10/} This segment the Commission found

^{10/} This second segment in the Telpak rate increase is the only one being challenged in this case.

presented the same lawfulness question presented by the first or intermediate rise that became effective in September of 1968. However, by October of 1969 the Commission had agreed to test the rate making methods that the various parties proposed in their "Statement of Ratemaking Principles and Factors" in the Telpak proceeding. And by this time, the Chief of the Common Carrier Bureau had issued a recommended decision in the Telpak Sharing Case referred to above (p. 12). Because of these circumstances, the Commission found there was no longer any need to defer consideration of the Telpak service and it ordered hearings to begin with regard to the intermediate rise and the increase presented for review here.

In filing the October 1, 1969 revisions to the tariff, A.T.&T. asserted that the increase in rate levels will improve the revenue cost relationship of Telpak and increase the contribution of that service to overall earnings. It justified the rate rises by cost studies submitted pursuant to the "Statement of Ratemaking Principles and Factors" which the parties had agreed upon in the general A.T.&T. rate proceeding.^{11/}

The petitioners argued before the Commission that

^{11/} While the new rates are substantially higher than those which had prevailed up until September 1, 1968, when the first step of the rate increase became effective, they remain very much less than individual private line rates, as the following table shows:

	Individual Private Lines	TELPAK		Discount over Private Lines of Proposed TELPAK
		Present	Proposed	
60 voice grade channels	\$15,450	\$ 5,800	\$ 7,200	53.4%
240 voice grade channels	61,800	18,000	25,300	57.4%

(a) the increases violate the "Rate-making Statement;" (b) the tariff ought not to be accepted while an investigation of the earlier rate rise is still under way; and (c) suspension and investigation together with an accounting order are inadequate to fully protect the interests of the parties during the time the tariff would be under investigation. The Commission, while suspending the tariff for the statutory three month period, unanimously rejected these arguments (A. 558):

The revised tariff schedules for Telpak, while raising questions that may be explored in hearing, cannot be construed as being so defective as to require rejection. The interested parties will have ample opportunity during the proceeding in docket No. 18128 to explore those areas in which they express concern and to develop their position on the record. (Para. 9)

* * *

We fail to perceive in petitioners' pleadings sufficient circumstances that would require the extraordinary remedies they seek * * * [I]t suffices to say that we find no necessity for the imposition of such extraordinary relief. However, we are not deciding at this time the extent of our authority to grant the kind of relief petitioners request. (Para. 10) 12/

12/ Two Commissioners did, however, dissent from the action suspending the tariff for three months on the grounds that an adjustment in the Telpak rates was long overdue and that the users had long been on notice of this fact. Commissioner Nicholas Johnson believed that "for purposes of a hearing and accounting order a 1-day suspension would serve as well as the 90-day suspension by the Commission." He argued against the longer suspension on the grounds that "Telpak is a service which the Commission has believed could be noncompensatory; that is, its rates do not compensate Bell for its costs and are designed to meet competition for private carriers" and that "Telpak users have been on notice for 8 years that the Telpak rates may be noncompensatory and for months that rate increases were coming." Id. at 390. Commissioner Kenneth Cox also disagreed with the 90-day suspension "in view of the long delay in correcting the discriminatory Telpak rates. . . ." Id. at 389.

Following the Commission's decision to initiate an investigation and hearing all the petitioners sought a stay of the Commission's order before this Court. With the exception of the Associated Press, they also petitioned the Commission to reconsider its action, again arguing that A.T.&T. should be directed to withdraw the increases or that the Commission should reject them outright. In support they asserted that the Commission committed error by allegedly trying to negotiate rate levels for specific services as a part of the continuing surveillance procedures used in reviewing the Bell System's interstate operations. They also maintained that irreparable injury would occur if the rates were to become effective.

On January 16, 1970, the Commission, after explaining that the surveillance proceedings had not resulted in the Telpak tariff changes submitted by A.T.&T., assured the petitioners that "A.T.&T. has no resort to any argument that such rates were part of an offset arrangement. . . . [and that] these rates, as all rates filed by carrier initiative, must meet the statutory requirement." (A. 726-727). With regard to petitioners' argument that the accounting provisions were inadequate, the Commission explained that petitioners had long been aware that A.T.&T. would file the rates under consideration and that there were alternative damage remedies available should the accounting prove to be insufficient.

On January 29, 1970, the Court also rejected petitioners' arguments of irreparable injury and denied their requests for stay.

ARGUMENT

Under the Communications Act (which is to be distinguished in this respect from other enabling legislation such as the Natural Gas Act), neither the acceptance of a tariff by the Commission nor the effectuation of rate schedules contained therein affects the question of its lawfulness. That matter is considered only after the Commission has held a hearing and approved or prescribed the rates and in so doing made them Commission approved rates. See Public Utilities Commission of the State of California v. United States, 356 F.2d 236 (9th Cir. 1966); Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co., 284 U.S. 370 (1932).

Section 204 of the Communications Act (47 U.S.C. 204) specifically empowers the Commission, either upon complaint or on its own initiative, to enter upon a hearing concerning the lawfulness of proposed rate increases and, pending the outcome of such a hearing, to suspend those rates for a maximum period of 90 days from the date on which they would otherwise become effective. Section 204 also leaves to the Commission's discretion whether or not to provide an accounting once a tariff is under investigation. The Commission's orders under review

institute such an investigation and provide for an accounting, so that if the rates are found to be unlawful refunds may be made. The proceeding is now under way with A.T.&T.'s direct case having been submitted in written form on April 1, 1970.

These cases thus come to the Court while the Commission proceeding is still in progress. We argue (Point I, *infra*) that for this reason the Commission's orders are not final and are therefore not reviewable. We believe that since the agency's statutory functions have not yet been completed petitioners are seeking in essence what this Court recently termed an "unwarranted judicial intrusion prior to the exercise of administrative expertise," Ad Hoc Committee on Consumer Protection v. United States, Case No. 24,022, Order filed March 17, 1970; see also Arrow Transportation Co. v. Southern Railway Co., 372 U.S. 658 (1963). However, assuming *arguendo* that the cases are properly before the Court at this time, the questions presented are necessarily quite limited, since the only thing the Commission has yet decided is to hold an investigation. Petitioners have briefed at considerable length a number of asserted issues, but most of them involve in one form or another the claim that the Commission abused its discretion when it invoked the statutory scheme embodied in Section 204 and commenced its investigation. We will show (Point II) that there is no substance to these claims. And finally the contention by some of the parties that the Commission has improperly prejudged the case is demonstrated to have no basis (Point III).

I. THE COMMISSION'S DECISION TO INSTITUTE AN INVESTIGATION INTO THE TELPAK TARIFF WHILE AT THE SAME TIME SUSPENDING THE RATE INCREASE AND PROVIDING FOR AN ACCOUNTING IS A NONREVIEWABLE ACTION.

Congress has conferred on this Court jurisdiction to review only final orders of the Federal Communications Commission. 28 U.S.C. 2342 (1965-66); Southland Industries v. F.C.C., 69 App. D.C. 82, 99 F.2d 117 (1938). While not necessarily the last order entered in a proceeding, to be final an order must "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." Chicago & Southern Air Lines v. Waterman Steamship Corp., 333 U.S. 103, 113 (1948). See also Columbia Broadcasting System v. United States, 316 U.S. 407 (1942); Isbrandtsen Co. v. United States, 93 U.S. App. D.C. 293, 211 F.2d 51, cert. denied sub nom. Japan-Atlantic & Gulf Conference v. United States, 347 U.S. 990 (1954); Bethesda-Chevy Chase Broadcasters, Inc. v. F.C.C., 128 U.S. App. D.C. 185, 385 F.2d 967 (1967).

When applied to the statutory procedure of Sections 204 and 205 of the Communications Act it is clear that the order in question here, designating the question of lawfulness of the Telpak revisions for hearing, neither imposes an obligation, denies a right, nor fixes a legal obligation. To be sure

petitioners must pay the higher rates pending the outcome of the hearing (just as the carrier is required to forego the increase during the suspension period), but "to mitigate that hardship"^{13/} suspension and accounting procedures have been set by statute and were expressly provided for by the Commission in this case.

Petitioners' assertion that the fact that the Commission chose to hold a hearing rather than reject the rates outright demonstrates that the matter is ripe for review or that petitioners' rights have been irreparably fixed is clearly contrary to relevant precedents. Such a "preliminary determination" amounts to no "final action subject to judicial review." National Industrial Traffic League v. United States, 287 F. Supp. 129, 130-131 (D.D.C. 1968), aff'd per curiam 393 U.S. 535. Insofar as petitioners contend that the interim applicability of the challenged rates causes them injury and thereby raises a reviewable issue, they are in effect quarreling not with the Commission's action but with the statutory scheme established by Congress. The accounting procedure invoked pursuant to Section 204 coupled with the damages provision of Section 207 effectively

^{13/} Arrow Transportation Co. v. Southern Railway Co., supra at 665-666.

curtails any damage that may befall petitioners pending a hearing. If petitioners prevail on the merits in the proceeding before the agency they can be compensated for the higher rates now being paid. But the mere fact that the proceedings ordered by the Commission may cause inconvenience or force some customers to choose between paying the higher rates or discontinuing the service does not render the agency's action reviewable. Arrow Transportation Co. v. Southern Railroad Co., *supra*; Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-52 (1938).

For this Court to review at this time the Commission's determination that an investigation is necessary with regard to the Telpak filings would be to obviate the Commission's Congressionally delegated legislative function to determine when a rate investigation is necessary and would effectively nullify the Commission's power to review rates and determine their reasonableness. Arrow Transportation v. Southern Railway, *supra*. Thus, in Booth v. A.T.&T., 253 F.2d 57, 58 (7th Cir. 1958), where a complainant sought a determination that certain rates were unreasonably high, the Court upheld a district court's action in dismissing the complaint: "Rate making is an administrative not a judicial function for '[t]o reduce the abstract concept of reasonableness to the concrete expression in dollars and cents is the function of the Commission.'" Montana-Dakota Public Utilities Co. v. Northwestern Public Service Co., 1951, 341 U.S. 246, 251, . . . Responsibility for determining just and reasonable long distance telephone rates is in the F.C.C."

The Supreme Court has repeatedly held that a regulatory agency's ratemaking power includes the right to choose its method of investigating rates. In fact, "the basis for the holding [in the Permian Basin Rate Cases and all the other cases cited by petitioners going to the Commission's power to reject tariffs] was the principle that the 'legislative discretion implied in the rate making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself.'" American Lines v. Louisville & N.R. Co., 392 U.S. 571, 592 (1968). See also Arrow Transportation v. United States, supra. Indeed if as Arrow holds, a court may not review an exercise of the Commission's authority with respect to suspension of rates pending an investigation, it is at least equally evident that a court should not enjoin the investigation itself when as here it is undertaken pursuant to the same statutory authority and (unlike Arrow)^{14/} the hearing orders afford substantial protection to affected interests

^{14/} In Arrow the lower court concluded, and the Supreme Court did not disagree, that there was "a grave danger of irreparable injury, harm or loss" to the complaining party but that even so no suspension of rates beyond the statutory period could be ordered. 372 U.S. at 661-662.

pending conclusion of the proceedings. Congress has conferred on the Commission the responsibility for passing in the first instance on the lawfulness of the rates. To consider the merits of petitioners' arguments that the tariff should have been rejected at the outset is to involve the Court in questions relating to its lawfulness or reasonableness that the Commission has not yet decided. This is precisely what Arrow prohibits.

^{15/}
The cases relied on by petitioners in support of their argument for judicial review at this time arose in different regulatory contexts.^{16/} They presented reviewable actions because the reasonableness of the rates had been approved by the agencies or by force of law under the respective regulatory schemes when contract agreements were filed. The court, in reviewing the new rates filed by carriers, was able as a matter of contract and statutory interpretation to determine that the filing was

^{15/} See for example the cases cited in brief of NAMBO, p. 27, Memphis Light, Gas & Water Div. v. Federal Power Commission, 102 U.S. App. D.C. 77, 250 F.2d 402 (1957); Cities Service Gas Company v. Federal Power Commission, 255 F.2d 860 (10th Cir., 1968); Mobile Gas Service Corp. v. Federal Power Commission, 215 F.2d 883 (3d Cir., 1954), affirmed sub nom. United Gas Pipe Line Co. v. Mobile Gas Service Corp., et al., 350 U.S. 332 (1956); and City of Los Angeles v. Federal Maritime Commission, 128 U.S. App. D.C. 326, 388 F.2d 582 (1967).

^{16/} Thus in Isbrandtsen v. United States, supra, on which the petitioners rely heavily, this Court specifically noted that the applicable statute involved an "entirely different scheme of regulation" from that embodied in the Interstate Commerce Act (which is in all material respects the same as Title II of the Communications Act). 93 U.S. App. D.C. at 299, 211 F.2d at 221.

on its face in violation of the rates approved by the agency.

In sum both the circumstances and the subject matter of the proceeding are such that it would be improper for the Court to review petitioners' claims at this juncture. The Commission's orders are interlocutory, not final. They take account of any interim impact on petitioners in the manner specified in the statute--by providing for an accounting that will make possible a refund if the rates are found unlawful. And the substantive issues presented, bearing as they do on the lawfulness of the tariff, would involve the Court in the very matters which are now under consideration in the Commission proceeding.

II. PETITIONERS HAVE FAILED TO SHOW THAT THE COMMISSION ACTED UNLAWFULLY OR BEYOND THE SCOPE OF ITS DISCRETION WHEN IT INSTITUTED AN INVESTIGATION OF THE TELPAK TARIFF INSTEAD OF REJECTING IT SUMMARILY AS PETITIONERS HAD REQUESTED.

All of the petitioners have made extensive arguments in which they have sought to demonstrate that the Commission has the power to refuse to accept a tariff filing. This is a question that is not really before the Court, however, since the Commission's orders do not hold that the agency lacks the requisite authority but that the exercise of any such authority would be inappropriate in the circumstances of this case. The Commission determined as a matter of discretion that the proper course to follow was the hearing route provided for in Section 204 of the Act and in so doing it rejected petitioners' claim that the only rational course open to the Commission was to refuse to accept the tariff at the threshold. We have argued above that in terms of finality the Commission's determination had no cognizable impact on petitioners and was therefore not reviewable. In any event, we think it clear beyond question that the agency was well within its discretion in acting as it did.

Petitioners' burden of demonstrating an abuse of discretion is obviously a heavy one since Congress has conferred on the Commission broad authority to determine the scope of its inquiry and regulate the course of its proceedings. See Sections 4(i), 4(j) of the Act, 47 U.S.C. 154(i), (j); F.C.C. v. WJR, 337 U.S. 265 (1949); F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134 (1940). Summarizing the holding of these and similar cases the Supreme Court recently stated:

In the Pottsville Broadcasting case, this Court stressed, in upholding this delegation of broad procedural authority, the established principle that administrative agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." 309 U.S., at 143. This principle, which has been upheld in a variety of applications, is an outgrowth of the congressional determination that administrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved. F.C.C. v. Schreiber, 381 U.S. 279, 290 (1965).

The Court's opinion makes clear that the Commission's power "to make ad hoc rulings in specific instances" (381 U.S. at 289) is equally broad. Here the Commission determined that it did not have enough information to resolve the questions raised

by the tariff so it initiated a hearing at which all parties would have an opportunity to be heard. Surely only the most compelling demonstration of adverse consequences to the petitioners or the public would warrant the Court's disturbing this action. No such showing has been made.

As we understand their briefs, petitioners' arguments may be summarized as follows: It was an abuse of discretion for the Commission to accept the tariff and institute an investigation because (1) hearings had not yet been concluded on a Telpak rate increase instituted in 1968; (2) the tariff violated a stipulation between the parties as to "ratemaking principles and factors"; and (3) the tariff was not accompanied by the supporting data required under the Commission's rules. We discuss these contentions seriatim.

A. That The Tariff Was Filed While Questions Regarding An Earlier Telpak Rate Increase Were Still Unresolved Does Not Require Its Summary Rejection.

17/

The petitioners assert that the Commission should not have allowed the tariff to be filed until its investigation into the lawfulness of the first rate increase had

17/ NAMBO Brief, pp. 18-20; Associated Press Brief, pp. 22-25; Airline Industry Brief, pp. 29-33; Aerospace Brief, pp. 12-23.

been resolved. The fact that the Commission did not for this reason reject the rates will, the petitioners assert, "prejudice orderly and efficient procedure" and allow A.T.&T. to earn in excess of the allowed rate of return for its services. Also in the same vein petitioners make the assertion that the Commission has violated the mandate of Section 204 of the Communications Act to "give to the hearing and decision" of questions posed by carrier filed tariffs "preference over all other questions pending before it." 47 U.S.C. 204. These assertions, petitioners argue, present grounds warranting extraordinary relief in the form of an order by this Court directing the Commission to reject the tariff.

Petitioners attempt to convey the impression that the present rate increase is simply the most recent of a long series of Telpak rate rises that have had the effect of inundating the Commission's processes while subjecting unprotected customers to one increase after another with no action being taken to determine the lawfulness of the increases. The events preceding the increase in issue here do not support these claims. In fact since 1961 the petitioners have in effect been faced with one increase in rates, the first intermediate level of which became

effective in September of 1968, and the second level (which is challenged here) becoming effective February 1, 1970. Both have been subject to an accounting following a suspension for the full statutory period so that if one or both of the increases are found unlawful compensation can be made. Moreover, the fact that the increase has come in two steps rather than one stems in large part from protests by petitioners and other customers that they could not readily absorb at one time an increase of this magnitude. This led A.T.&T. to withdraw its original proposal made in 1967 and to resubmit it in its present form, providing the same rate level but one that would be achieved gradually over an eighteen month period.

Nor is there merit to the contention that the proceeding has been unduly delayed and that this required the Commission to reject the second stage of the increase until the investigation of the first stage has been completed.^{18/} The Commission decided in 1968 to defer an immediate hearing on the level of the Telpak rates because it was concurrently considering in

^{18/} Logically the opposite would seem to be true. If the carrier believes its present proposal reflects the proper rates, the investigation should focus essentially on them. Otherwise, a second hearing might well be required after the first is completed. This is not to say that the Commission is powerless to protect its processes from a long succession of rate increases which threaten to postpone indefinitely any determination of their lawfulness. But this is not what happened here, despite the contentions to the contrary of some petitioners.

another proceeding possible methods and factors to test the validity of what would be the proper rate of return for a particular A.T.&T. service (A. 176). Until this preliminary consideration was resolved, the Commission concluded that the rate levels for the Telpak service could not be properly assessed.^{19/} However, the Commission stated:

In view of our temporary deferral of hearings in [the Telpak rate case] it is increasingly important that the proper ratemaking principles and factors be determined . . . as expeditiously as possible. While we are confident the proceeding has progressed with commendable speed, we are, nevertheless, directing the hearing examiner to take all feasible measures to achieve the earliest closing of the evidentiary record on this particular issue. (13 F.C.C. 2d at 855)

A year later, before the second adjustment was made to the Telpak service, the parties formed a statement of ratemaking principles and factors which the Commission "reviewed . . . solely for the purpose of determining whether the implementation of the suggested procedures might facilitate the determination of

^{19/} This is the only instance in this proceeding where it could conceivably be argued that the Commission failed to give the investigation the "preference" over other pending matters referred to in Section 204. No review of the Commission's action was sought at the time, and in any event, as explained above, the delay was seen as promoting rather than delaying ultimate resolution of the issues.

appropriate ratemaking principles for interstate services of the Bell System." (A. 215) The Commission concluded that the various methods urged by the parties could be tested in the Telpak proceeding. The agreement was noted by the Commission in July of 1969 and in October 1969, A.T.&T. submitted the second step of the Telpak rise. The Commission ordered hearings to begin on November 1, 1969.

As this history demonstrates the Commission has from the outset been concerned with a speedy resolution of the issues presented by Telpak, though not at the cost of leaving unanswered important questions that are preliminary to proper consideration of the tariff. See A.T.&T. Private Line Case, 18 Pike & Fischer, R.R. 82, 84. Since the Spring of 1968 when the investigation began until the present, the tariff has been under active consideration, either in that proceeding or in the related general inquiry. Thus, this is not, as petitioners suggest, an instance of administrative inaction nor one in which the mandate of Section 204 has been violated. Rather the record shows that the agency is moving in an orderly way toward the resolution of a complex ^{20/}problem.

^{20/} The further allegation that A.T.&T. earns in excess of the overall allowable rate of return, is irrelevant to the basic question posed here as whether the level of return maintained by the Telpak service is compensatory. Moreover, as we show infra, any increase in revenues based on the current Telpak rate schedules has been offset by rate reductions in other services.

In any event nothing in petitioners' arguments as to the course of the proceeding thus far warrant setting aside the orders under review. As the Commission stated (A. 563) related preliminary questions have been sufficiently resolved to allow the investigation to go forward and it is currently proceeding in an orderly way. Prehearing conferences have been held and on April 1, 1970, A.T.&T. submitted written testimony in support of its rate proposals, together with cost and marketing studies. These are under study by the other parties to the hearing prior to their being subject to cross-examination. Why it is arbitrary for the Commission to proceed in this manner instead of imposing a prohibition on the filing of the second rate rise while it pursues an investigation into the first is something that petitioners, notwithstanding the prolixity of the arguments, have not demonstrated.

B. Charges That The Tariff Violates The Statement Of Ratemaking Principles Agreed To By The Parties And That It Was Not Accompanied By Sufficient Supporting Data Are Without Merit And In Any Event Do Not Show That The Commission Abused Its Discretion In Invoking The Hearing And Accounting Procedures Specified In Section 204 Of The Act.

Petitioners contend that the tariff should have been rejected because of certain alleged formal defects. Specifically they make two arguments: that the tariff as filed constitutes a violation of the "Statement of Rate Making Principles and Factors"

stipulated to by the parties in July of 1969 (18 F.C.C. 2d 761); and that the form of the tariff schedule violates Commission Rule 61.33(a) (47 CFR 61.33(a)). Both of these arguments are erroneous in fact and neither would in any case constitute ground for setting aside the Commission's determination to hold hearings on the proposed rate increases.

1. The Statement of Rate Making Principles and Factors.

The Statement of Rate Making Principles and Factors in question was arrived at in the already referred to general investigation of A.T.&T.'s rates and charges (Docket No. 16258) where the Commission considered at length what considerations should govern the relationship among the rate levels for each of A.T.&T.'s principal services. After 100 days of hearing, 12,000 pages of testimony and following cross-examination, but before rebuttal testimony, the parties, consisting of carriers, customers and members of the Commission's Common Carrier Bureau staff, reached agreement on a statement setting forth ratemaking principles and accompanying procedures for implementing their consideration (18 F.C.C. 2d 761 (A. 214)). The "Statement" begins with a list of principles and factors to which the parties but not the Commission stipulated and is followed by a list of procedures

to be utilized to implement their consideration.

These procedures were approved by the Commission (A. 215).

The parties stated in their agreement that in substance the statement should serve as a "guide for further detailed studies of rate levels and rates." 18 F.C.C. 2d 768 (A. 224). Petitioners concede (See e.g. Brief for Aerospace Industries Association of America) the Commission "made it abundantly clear . . . that we were not necessarily approving the stipulation, merely noting it." 20 F.C.C. 2d at 385-386. See also 18 F.C.C. 2d at 764. And, in fact, they do not claim that the Commission has violated that portion of the statement it agreed to implement. Instead, they argue on the basis of language formed as part of the stipulation that preceded the actual procedures approved by the Commission that A.T.&T. and its customers "had negotiated a contractual right to have the studies submitted, assimilated, tested, probed, evaluated, discussed, and, where appropriate, modified, . . . before any consideration could be given to the tender of formal tariffs for statutory effectiveness." Brief of Airlines, p. 34.

The actual controversy with regard to the statement centers on a part of the stipulation noted by the Commission

but not approved as part of the procedures. It is the position of the petitioners that A.T.&T. did not provide the customers with "meaningful participation" in the making of its cost studies that served as the basis of the rate rise. A.T.&T. (Br. p. 56) on the other hand claims that the petitioners were invited to well publicized meetings on ten different occasions. However, regardless of whether or not this was "meaningful" participation, the essential question now is whether or not there are substantial questions affecting the lawfulness of the tariffs and this, the Commission has decided, can best be determined on a full record after a hearing.

Petitioners in arguing that the rate should be rejected on this basis attempt to analogize the agreement to contractual rights of parties under the Natural Gas Act, 15 U.S.C. §717 et seq., where the filing of certain agreements with the Federal Power Commission is tantamount to the Commission approving the rates.^{21/} But such a consideration is inapt when applied here, for unlike provisions of that Act, the Communications Act makes no provision for the filing and approval of such rate agreements by the Commission. See United Gas Pipe Line Co. v. Mobile Gas Service Corp. et al., 350 U.S. 332, 338.

^{21/} Cf. F.P.C. v. Sierra Power Co., 350 U.S. 348 (1956).

2. The Filing Did Not Violate 61.33(a) of Commission's Rules. A.P.'s attempt to demonstrate that the tariff is defective on its face in that it violates 61.33(a), 47 CFR 61.33(a), of the rules is premised on an assertion never made before the Commission, namely that 61.33(a) requires a carrier in transmitting a tariff change to accompany the tariff with a prima facie showing in support of the change.^{22/}

The rule relied upon, 61.33(a), which governs the content of letters of transmittal accompanying tariff filings reads in pertinent part as follows:

[G]ive a statement showing in detail the reasons for all changes in charges or regulations and in case any such change results in charges, the facts upon which the carrier relies in justification thereof.

A.P.'s assertion that this means a prima facie showing was never presented to the Commission and is therefore improperly

^{22/} The argument that the Telpak tariffs should be rejected because of their violation of Commission rules is pushed to its extremity when the Associated Press alleges (Br. p.18) that the change in telegraph/telephone equivalency ration from 6 to 1 to 2 to 1 should have been designated in the margin of the tariff as a tariff increase by the letter "I" instead of as a tariff change by the letter "C". Even assuming arguendo that A.P. is correct, such an argument is formalistic and frivolous and hardly presents justification for rejecting tariff changes that present basic questions with regard to their compensatory nature and are the subject of an extensive Commission investigation. The error would at the most require the quick use of an eraser and pen to correct the error, leaving totally unresolved the questions of substance.

presented to this Court (Section 405, 47 U.S.C. 405). Moreover, the assertion is plainly an inaccurate reading of the above rule which provides that a "showing in detail" must be given, but does not state that the showing must be prima facie.^{23/} In any event, however, the showing made by A.T.&T. was presented in detail and it is precisely these details that the petitioners A.P. (Br. 17-22) and the Airline industry parties (Br. 36-38) have addressed themselves to in arguing that they are defective.^{24/}

23/ A.P. relies on a Notice of Proposed Rule Making (34 F.R. 17116) to change the form of tariff submissions. Whether or not this showing was adequate under the new proposed rule is irrelevant to the determination of whether the current rule's standard was met here. What the proposal makes clear is that the present standard for acceptance of a tariff change is not that it be accompanied by a prima facie showing.

24/ The actual showing consists of the following items which accompanied the letter of transmittal:

1. Interstate Private Line Market Study
2. LRIC Analysis of Telpak, PL Telephone, and PL Telegraph services
3. LRIC Tariff F.C.C. No. 260, Series 1000, 2000, 3000, 4000 and 5000, Cost Analysis
4. LRIC Tariff F.C.C. No. 260, Series 1000, 2000, 3000, 4000 and 5000, General Work Papers, Common Cost Factors, Computer Program Data, etc.
5. 1967 Fully Distributed Embedded Cost Study Work Papers Volume II

Significantly A.P. has not requested that all of these items be placed in the Appendix so that the Court can pass on its assertion that the showing contained therein was sufficient.

Significantly, petitioners in asserting that this rule was violated have not asserted that their procedural rights were in any way curbed. Each has filed numerous pleadings directed to the filing and will be given opportunity in the hearing to develop the validity of their contentions. The Supreme Court in considering rules similar to 61.33 governing filings before the I.C.C. explained in American Farm Lines v. Black Ball Freight Service, decided April 20, 1970, 38 U.S.L.W. 4310, 4313, that the Commission's judgment as to when it has been sufficiently informed on tariff filings is nonreviewable unless there is "a showing of substantial prejudice to the complaining party. NLRB v. Monsanto Chemical Co., 205 F.2d 763." The purpose of rules of this kind, the Court's opinion makes clear, is not "primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion." Id.

III. THE COMMISSION HAS NOT PREJUDGED THIS CASE.

Petitioners attempt to lend this proceeding an appearance of reviewable finality despite its interlocutory nature by suggesting that the Commission has prejudged the hearing issues. Even were this contention not manifestly contrary to fact, it could not be dispositive since questions of prejudgment cannot be resolved in advance of an actual ruling.

The Airline Parties (pp. 21-29) and NAMBO (pp. 13-16) ^{25/} note that as a result of the Commission's continuing surveillance of Bell System's interstate operations, rate reductions for interstate long distance telephone calls were filed totaling \$150 million per year. Also at the same time and in addition to the \$150 million reduction, A.T.&T. had agreed to file reductions

^{25/} Conferences between members of the Commission or Commission staff personnel and telephone company representatives have been part of continuing surveillance for nearly 30 years. See F.C.C. Annual Report, 1937, p. 91. In recent years, the Commission has held informal reviews of the Bell System's interstate operations and earnings. The purpose of these meetings is to keep the Commission informed of the level and trend of the Bell System's interstate earnings and, in conformity with the continuing surveillance program, promptly to pass on the benefits of reduced rates to the public. The carrier's customers have a statutory right to direct challenges to the rates and request a formal hearing on the issue of their reasonableness. These procedures have been judicially approved in Public Utilities Commission of the State of California v. United States, 356 F.2d 236 (9th Cir., 1966), cert. denied, 385 U.S. 816.

for interstate and long-distance telephone calls of about \$87 million representing an offset to increases in revenues from higher rates proposed by A.T.&T. for television and audio transmission, Telpak and TWX services.

These reductions were initiated by the carrier but because they were announced by the Commission in a press release (A. 572), petitioners attempt to argue that the Commission has expressly found them lawful. Using this assertion as premise, petitioners conclude that the Telpak rate increases, because they were included as part of the \$87 million offset, have been prejudged.

The Commission considered petitioners' arguments with regard to prejudgment in great detail, explaining that the considerations which led A.T.&T. to raise the Telpak rates were based on cost studies completed long in advance of the surveillance proceedings. Moreover, the Commission noted that the \$87 million offset was unrelated to the reductions that resulted from the overall surveillance of the rate of return.

The \$87 million offset, which included the Telpak rises, in reality left the overall rate of return unaffected. Demonstrably, petitioners are incorrect when they assert that

Telpak rises are tied to the surveillance of A.T.&T.'s overall rate of return. In any event, it has long been held that Commission announcement of rate changes filed as a result of surveillance proceedings does not render them Commission approved rates. Public Utilities Commission of the State of California v. United States, supra.

Beyond what the Commission has already stated on this point (A. 725-727), the argument that petitioners will not receive a fair hearing is, as a matter of law, unanswerable at this point. The Commission has stated that "no decision as to the lawfulness of the Telpak tariff offering or the specific rates provided for therein" has been made. As this Court has stated: "Until and unless the contrary is shown, we must assume that the Commission will act in good faith in respect to that declaration." Peoples Broadcasting Co. v. F.C.C., 93 U.S. App. D.C. 78, 81, 209 F.2d 286, 288 (1953). Moreover, it is well settled that courts cannot "assume in advance that an administrative hearing may not be fairly conducted." Fahey v. Mallonee, 332 U.S. 245, 256 (1947); Booth v. A.T.&T., supra.

26/ Texaco, Inc. v. F.T.C., 118 U.S. App. D.C. 366, 336 F.2d 754 (1964), remanded on other grounds, 381 U.S. 739 (1965), and Cinderella Career and Finishing Schools, Inc. v. F.T.C., Case No. 22,624 (U.S. App. D.C. March 20, 1970), relied upon by petitioners, in contrast to this proceeding, were the result of Court review after administrative expertise had been brought to bear and the issues allegedly prejudged had been decided. Secondly, the relief requested in these cases was the disqualification of a single commissioner; the portent of petitioners' arguments would be to disqualify the whole Commission, effectively disabling it from carrying out its statutory duties. F.T.C. v. Cement Institute, 333 U.S. 683. Finally, there is nothing whatever in the Commission's language relied on by petitioners to show "that the minds of its members were irrevocably closed on the subject," F.T.C. v. Cement Institute, supra at 701, and that the result of the investigation is preordained.

CONCLUSION

For the foregoing reasons, the Commission's orders should be affirmed.

Respectfully submitted,

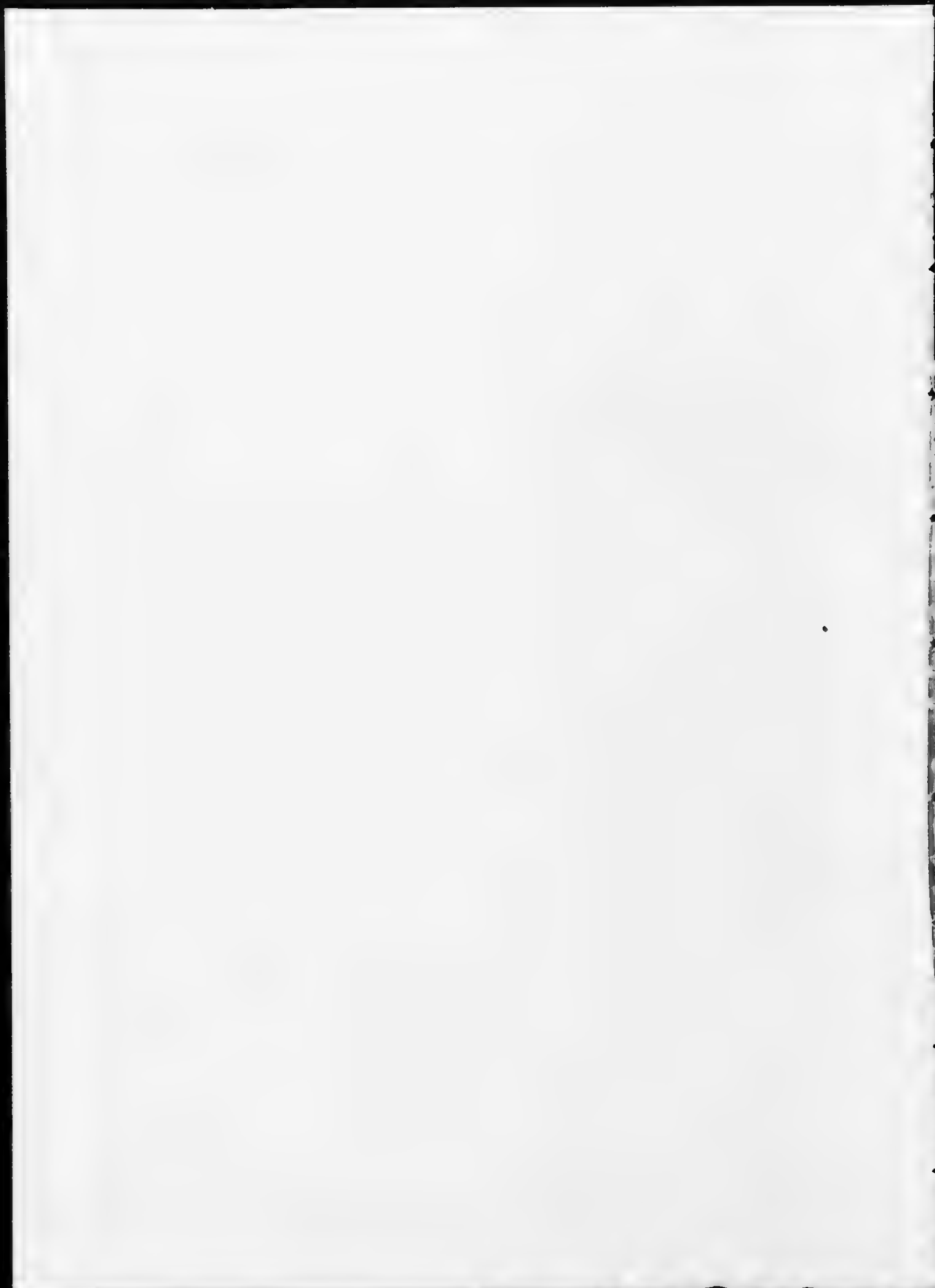
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APPENDIX

SECTION 204. Whenever there is filed with Commission any new charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, but not for a longer period than three months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed change of charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased charges as by its decision shall be found not justified. At any hearing involving a charge increased, or sought to be increased, after the organization of the Commission, the burden of proof to show that the increased charge, or proposed increased charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

29-4

United States Court of Appeals
BRIEF FOR INTERVENOR
AMERICAN TELEPHONE AND TELEGRAPH COMPANY

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 23,833, 23,836, 23,839, 23,841, 23,842, 23,843

THE ASSOCIATED PRESS; AEROSPACE INDUSTRIES ASSOCIATION
OF AMERICA, INC.; AIR TRANSPORT ASSOCIATION OF
AMERICA, ET AL.; AMERICAN TRUCKING ASSOCIATION, INC.;
AERONAUTICAL RADIO, INC., and NATIONAL ASSOCIATION
OF MOTOR BUS OWNERS, *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION and the UNITED
STATES OF AMERICA, *Respondents,*
AMERICAN TELEPHONE AND TELEGRAPH COMPANY and THE
WESTERN UNION TELEGRAPH COMPANY, *Intervenors.*

On Petitions To Review Orders of the
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IN THE
United States Court of Appeals

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AMERICAN TELEPHONE AND TELEGRAPH COMPANY and THE
WESTERN UNION TELEGRAPH COMPANY, *Intervenors*.

On Petitions To Review Orders of the
Federal Communications Commission

BRIEF FOR INTERVENOR
AMERICAN TELEPHONE AND TELEGRAPH COMPANY

ISSUE PRESENTED

The Federal Communications Commission, having suspended AT&T's proposed TELPAK rate increase for the full three-month period permitted by Section 204 of the Communications Act, refused petitioners' request to defer the effectiveness of the rate for an additional period of time pending completion of hearings on its lawfulness. The issue presented in this case is whether the Court should review the Commission's order and command the Commission to grant petitioners' request.¹

¹ This case has previously been before this Court when petitioners' applications for interim relief pending appeal were denied on January 29, 1970.

COUNTERSTATEMENT OF THE CASE

A. The Nature and Background of the TELPAK Rates

In 1961, AT&T initiated TELPAK service—a private line communications service offered to large-volume users at rates substantially less than those for other private line services. Originally, TELPAK consisted of four distinct categories of service, TELPAK A, B, C and D, providing 12, 24, 60 and 240 voice channels, respectively. Soon after the service began the Commission instituted an investigation of the rates (Docket No. 14251), which resulted in a decision in 1964 that the rates for the TELPAK A and B classifications were unlawfully low because not justified in terms of cost or competitive necessity. The Commission held that TELPAK C and D were apparently justified on the grounds of competitive necessity, but ordered a further investigation to determine whether these rates were compensatory. 38 F.C.C. 370 (1964); 37 F.C.C. 1111 (1964); 38 F.C.C. 761 (1965).

This Court sustained the Commission's decision, *American Trucking Association v. FCC*, 126 U.S. App. D.C. 236, 241, 377 F.2d 121, 126 (1966), *cert. denied*, 386 U.S. 943, noting the "wide" and "startling" disparity between the then effective ordinary private line rates and the TELPAK rates.²

Following this Court's decision, the Commission ordered the elimination of the TELPAK A and B classifications. (A. 7, 16). At the same time it discontinued Docket No. 14251 and incorporated the issue whether the existing TEL-

² The Court's opinion made the following comparison of ordinary private line rates and the TELPAK rates (126 U.S. App. D.C. at 241, 377 F.2d at 126):

	Individual [*] Private Lines	TELPAK
(A) 12 Voice Grade Channels	\$ 3,780	\$ 1,860
(B) 24 Voice Grade Channels	7,560	2,720
(C) 60 Voice Grade Channels	18,900	4,300
(D) 240 Voice Grade Channels	75,600	11,700

[*] Equipped for voice only at 100 miles

PAK C and D rates were compensatory into Docket No. 16258, a general investigation instituted by the Commission in 1965 into the lawfulness of AT&T's charges for all interstate and foreign communication services.³

Pursuant to these orders, AT&T on January 9, 1967, filed revised tariff schedules which eliminated the TELPAK A and B classifications. At the same time AT&T submitted to the Commission and distributed to all parties in Docket No. 16258 the following rate proposals for TELPAK C and D, which were at the same level as those now challenged by petitioners, and suggested that these proposed rates should become effective toward the latter part of 1967 (AT&T letter to FCC, dated January 9, 1967, A. 22):⁴

	1967 Applicable Rate	1967 Proposed Rate
<u>Interexchange Channels—</u> <u>per airline mile</u>		
TELPAK C Base Capacity	\$25.00	\$30.00
TELPAK D Base Capacity	45.00	85.00
<u>Service Terminals—per</u> <u>terminal</u>		
Voice or teletypewriter:		
First terminal	15.00	35.00
Additional	5.00	15.00
<u>Telephone/Telegraph</u> <u>Equivalency</u>		
	1 to 12	1 to 2

³ The Commission noted that since Docket No. 16258 involved, *inter alia*, the question of the distribution of earnings among AT&T's principal rate classifications it was an appropriate proceeding in which to consider the sole issue remaining with respect to the existing TELPAK C and D rates, *i.e.*, whether they were compensatory. 6 F.C.C.2d 177, 181 (1966). The Commission also observed that AT&T's "additional cost data as to TELPAK C and D, being required to be filed in docket No. 16258, may be accompanied by proposed changes in those rates." 7 F.C.C.2d 30, 31 (1966).

⁴ These proposals were submitted in compliance with the order of the Commission's Telephone Committee, released November 25, 1966, in Docket No. 16258 (FCC 66M-1582), which required AT&T to submit revised cost data for TELPAK C and D, as well as any proposed rates for those services.

AT&T explained that it was not immediately filing tariff revisions embodying these proposals so that customers could have adequate time to make such adjustments as they might think desirable in light of the proposed TELPAK C and D increases and of the elimination of TELPAK A and B. AT&T also provided a detailed and comprehensive explanation and cost justification for the increases proposed in TELPAK C and D and for the proposed change in the telephone/telegraph equivalency ratio.

On February 1, 1968, almost 13 months after the distribution of the January 9, 1967, rate proposals, AT&T filed tariff revisions to become effective April 1, 1968, embodying the TELPAK rates previously proposed. (AT&T Trans. No. 10001, A. 83). AT&T's letter of transmittal referred to the previously furnished supporting data which indicated that an increase in the general level of rates for TELPAK service was required to improve the earnings contribution of this category of service. Additional comprehensive supporting data were furnished to the Commission at that time.

Numerous petitions were filed by petitioners and other TELPAK users arguing that the proposed TELPAK rates were unreasonably high and requesting, *inter alia*, that the Commission reject or suspend the proposed rates, re-schedule their effective date, or require AT&T to withdraw the rate proposal. (A. 43, 98, 118; R.I. Nos. 113-15, 120-21, 123-25). These pleadings appeared to rest on the assumption that the petitioners had a right to continue to enjoy the TELPAK rates then in effect and that AT&T should not be allowed to increase the rates until the Commission determined that those rates were not compensatory. In support of their position the petitioners contended that the immediate institution of the proposed rates would have an adverse impact upon TELPAK users by disrupting their budgets and plans for communications service.

AT&T opposed these prayers for relief on the grounds that under the Communications Act it had the right to

initiate rate changes and that the Commission lacked the power to grant the extraordinary relief requested. (AT&T Opps. of February 9 and March 6, 1968, A. 89, 114). On March 13, 1968, however, AT&T requested special permission from the Commission to withdraw the February 1, 1968, tariff revisions. (AT&T App. No. 643, A. 134). AT&T stated that it believed the proposed rates were fully justified but that it was withdrawing them solely to give users more time to make any arrangements that might be required by higher rates. AT&T also stated that it intended to file a lower interim rate increase that would be an intermediate step in ultimately achieving the level of the higher rate increases that it had proposed.⁵

B. The Interim Rate Increase

On March 25, 1968, AT&T withdrew its February 1, 1968, TELPAK tariff and filed interim rates to become effective June 1, 1968, which increased the then-effective rates in TELPAK C from \$25.00 to \$28.00, in TELPAK D from \$45.00 to \$60.00, and in Service Terminals from \$15.00 to \$25.00, and which changed the telegraph/telephone equivalency ratio from 12 to 1 to 6 to 1. (AT&T Trans. No. 10069, A. 136).

Petitioners and other TELPAK users again filed pleadings requesting suspension of the proposed rates and other forms of relief. (R.I. Nos. 130, 132, 134, 136). By an order of April 10, 1968, the Commission suspended the

⁵ "It is our view that the TELPAK rate levels embodied in our tariff revisions filed on February 1, 1968 are fully justified by the relevant cost and market considerations referred to in our Transmittal No. 10001. Nevertheless, we recognize that the impact on our customers of these proposed changes is, in many cases, very substantial, and that in some cases customers have indicated that required arrangements cannot be made by April 1.

"In the circumstances we propose to withdraw the tariff revisions now scheduled to become effective April 1, 1968 and to file a new set of revisions which will provide for a lesser increase in the level of TELPAK rates. We believe that in any Commission investigation it will be demonstrated that TELPAK rates should be established at substantially the level of those which were filed to become effective April 1, 1968. The proposed new revisions will constitute an intermediate step in achieving that level." (A. 134).

proposed rates to September 1, 1968—the full three-month period permitted by Section 204 of the Act—and instituted an investigation into their lawfulness (Docket No. 18128). (A. 170). The Commission stated:

“We are suspending the proposed tariff schedules to the full extent of our statutory authority on the basis of the considerations recited above. This means that the schedules will become effective September 1, 1968. Moreover, it should be clearly understood by the TELPAK users, that, in the event a complete hearing record indicates that increases in the level of TELPAK rates are justified or required, or that the TELPAK classification should be eliminated, any increases occasioned thereby will become effective without delay. The users should henceforth govern themselves accordingly, and their communications budgets should be prepared with this contingency in mind. In this connection, users have been on notice since 1961 that TELPAK rates presented substantial questions of lawfulness requiring formal investigation and that significant increases in these rates could result.”⁶ (A. 172).

Certain of the petitioners and other users in their pleadings initially addressed to AT&T's tariff filing of March 25, 1968, in addition to seeking suspension or indefinite deferral of the proposed TELPAK increases, asked the Commission to impose a refund and accounting require-

⁶ The Airlines argue that this passage in the Commission's order “implicitly recognized the understanding that there would be no further rate increases pendente lite, i.e., the interim rate increases were to remain in effect unless and until the Commission permitted some different level, after appropriate findings in some formal proceeding.” Airlines Br. p. 6. There is no support for this argument in the Commission's language. The Commission's statement did nothing more than give TELPAK users notice that the Commission itself might take action that would require substantial increases in TELPAK rates or even eliminate the classification altogether. The language does not state any “understanding” that AT&T would file no additional rate increases and does not suggest, even by implication, that there was any such understanding. In fact as we have noted above, petitioners had been on notice since March 13, 1968, that the first TELPAK rate increase was “intermediate” in nature and that AT&T intended to raise the rates to the higher level proposed in its filing of February 1, 1968.

ment and to take certain procedural steps with respect to the investigation of the proposed increases.⁷

The Commission dealt with these various requests for relief in an order of July 10, 1968, which, *inter alia*, imposed a refund requirement with respect to the proposed TELPAK increases. (A. 176). The Commission further held (1) that it would determine in Docket No. 16258 (the comprehensive investigation of AT&T's interstate rates) whether "competitive or other valid considerations justified the pricing discriminations" existing in the TELPAK offering and, if so, whether the existing or proposed rates for TELPAK made or would make an appropriate contribution to AT&T's interstate revenue requirements;⁸ (2) that the proceedings in Docket No. 16258 and those in Docket No. 17457 (involving TELPAK sharing) should go forward simultaneously and be expedited; (3) that since the TELPAK service was a rate classification within the category of private line services the issues in Docket No. 18128 should embrace all of the private line tariffs, except audio and video program transmission services, but including the charges for teletypewriter station equipment; and (4) that hearings in Docket No. 18128 concerning "the internal specifics" of the TELPAK rate structure should be deferred until the basic determinations on rate-making principles were made in Docket No. 16258 and the sharing issue was decided in Docket No. 17457.

Following the Commission's order of July 10, 1968, certain parties, including only one of the petitioners herein (Aerospace), filed additional pleadings again requesting that the Commission suspend or defer the effective date of

⁷ Air Transport Association, for example, requested that the Commission consolidate in one proceeding (a) the investigation of the proposed TELPAK rate increases, (b) the questions with respect to the sharing provisions of the TELPAK tariff, and (c) the hearing in Docket No. 16258 with respect to the compensatory character of the then existing TELPAK rates. (ATA Petn. of March 25, 1968, R.I. No. 130).

⁸ The Commission stated that these determinations were "of threshold essentiality to a determination of the reasonableness and lawfulness of the specific rates." (A. 180).

the proposed TELPAK increases beyond September 1, 1968, until a conclusion of the hearings on the threshold issues with respect to the compensatory character of the existing TELPAK rates and their contribution to interstate revenues.⁹ (R.I. Nos. 150, 152).

In an order of August 28, 1968, the Commission denied the request to suspend or defer the effective date of the proposed TELPAK rate increases beyond September 1, 1968. (A. 205). The Commission discussed the provisions of Section 204 and 205 of the Communications Act of 1934 and specifically disclaimed that it had any authority under those sections or under Sections 4(i) and 303(r) of the Act to suspend the interim increases beyond the period prescribed by the statute or to grant the extraordinary relief requested.¹⁰ The Commission also noted that the overall level of the TELPAK rates including the interim increased rates were directly at issue in Docket No. 16258 which it had ordered expedited.

The petitioners did not seek judicial review of the Commission's orders of April 12, 1968, July 10, 1968, or August 28, 1968. On September 1, 1968, the interim increase in the TELPAK rates, which was substantially lower than that originally proposed by AT&T on January 9, 1967, became effective.

⁹ None of the other petitioners herein objected at that time to the Commission's deferral of the hearings in Docket No. 18128.

¹⁰ In refusing to suspend the proposed rate increase beyond the statutory period or to grant petitioners other extraordinary relief, the Commission stated that:

"In the Order released April 12, 1968 (FCC 68-388), we noted that '* * * users have been on notice since 1961 that TELPAK rates presented substantial questions of lawfulness * * * and that significant increases in these rates could result.' " (A. 208).

This statement cannot be reconciled with the petitioners' argument that in its order of April 12, 1968, the Commission had recognized an understanding that there would be no additional increases in TELPAK rates until the question whether the existing rates were compensatory had been determined. See p. 6, n. 6, *supra*.

C. The Proceedings in Docket No. 16258 and the Statement of Rate-Making Principles and Factors

It has been pointed out above that the Commission incorporated into Docket No. 16258 the issues whether the existing TELPAK rates were compensatory and made an appropriate contribution to AT&T's interstate revenue requirements. Those issues were considered in what came to be known as Phase 1-B of that docket, which was devoted to developing appropriate rate-making principles and factors that should govern the relationship among the rate levels for each of AT&T's principal services. 13 F.C.C.2d 853 (1968).¹¹

The hearings in Phase 1-B of Docket No. 16258 began in October 1967 and by February 14, 1969, had involved approximately 100 days of hearings and 12,000 pages of testimony. 18 F.C.C.2d 761, 762 (1969). In the hearings AT&T cost and market studies were introduced which in AT&T's view justified both the higher TELPAK rate level that AT&T had originally proposed on January 9, 1967, and the lower interim TELPAK rate increase that became effective on September 1, 1968. By February 14, 1969, all direct testimony in the Phase 1-B proceedings had been offered and cross-examination had been conducted on all of that testimony except certain FCC staff exhibits containing cost studies.

In 1969 the parties to Docket No. 16258 held a series of informal meetings pursuant to order of the Commission's Telephone Committee in Phase 1-B "to facilitate the possibility of resolution of some or all of the pending issues by mutual agreement." FCC 69M-197. All of the parties were entitled to attend and the principal parties in Phase 1-B actively participated. As a result of these meetings a

¹¹ In the earlier stage of Docket No. 16258, which came to be known as Phase 1-A, the Commission considered issues relating to the overall rate of return, the rate base, and the separation between interstate and intrastate activities. The Commission concluded Phase 1-A of its investigation in July 1967. 9 F.C.C.2d 30; 9 F.C.C.2d 960.

Statement of Rate-Making Principles and Factors (hereinafter sometimes referred to as the "Statement") was formulated by the parties participating in the meetings and by the Common Carrier Bureau of the Commission. (A. 214, 220). The Statement contemplated that AT&T would make new cost studies in conformity with the rate-making principles set forth and thereafter file such further specific rate adjustments "as may be consistent therewith." (A. 224). It also set out certain procedures for AT&T to follow in making the new cost studies and in initiating rate increases. (A. 224-26).¹²

In an order of July 29, 1969, the Commission took cognizance of the Statement and recognized that by October 1, 1969, AT&T might file rate adjustments on the basis of the studies contemplated by the Statement. (A. 214). The Commission provided that the lawfulness of any adjustments in the TELPAK rates would be resolved in Docket No. 18128. (A. 217-18).¹³ None of the petitioners sought judicial review of this order.

D. The Rate Increase Here Involved and the Commission's Orders Relating Thereto

On October 1, 1969, AT&T filed a tariff revision with the Commission containing increased rates for TELPAK service to become effective November 1, 1969. (AT&T Trans. No. 10609, A. 272). This filing increased the TELPAK C and D rates to the same level that had been originally proposed in January 1967 and that had been embodied in the tariff filed in February 1968. See pp. 3-4, *supra*.

¹² The procedural provisions of the Statement are discussed at pp. 36-40, *infra*.

¹³ The Commission also incorporated in Docket No. 18128 the record in Phase 1-B of Docket No. 16258. It provided for the disposition of any remaining issues in Docket No. 16258 relating to other rates in terms that contemplated that there would be no further proceedings in Phase 1-B of that docket. (A. 217-18). The proceedings in Phase 1-B of Docket No. 16258 were terminated by Commission order on February 18, 1970. 21 F.C.C.2d 495.

The proposed rate increase was based on extensive cost and market studies that AT&T had made in compliance with the Statement of Rate-Making Principles referred to above. See pp. 9-10, *supra*. AT&T also submitted materials that constituted the most comprehensive analysis and justification that AT&T has ever presented to the Commission with a tariff filing. (A. 280; R.I. No. 108). The level of the rates was determined with a view to mitigating the impact of the increase on TELPAK customers.¹⁴ The proposed increase left the users of TELPAK service with a substantial rate advantage as compared with regular private line rates for the same quantity and kind of service. The extent of this advantage is shown by the following comparison between the rates applicable to regular private line service, the interim TELPAK rates, and the TELPAK rates filed on October 1, 1969, which are now in effect:

		Individual [*] Private Lines	TELPAK	
			Interim	Effective
(C)	60 Voice Grade Channels	\$15,450	\$ 5,800	\$ 7,200
(D)	240 Voice Grade Channels	61,800	18,000	25,300

[*] Equipped for voice only at 100 miles.

AT&T's tariff filing of October 1, 1969, was followed by another plethora of pleadings from petitioners and other TELPAK users asking the Commission to suspend and investigate the proposed rate increase and to provide various forms of extraordinary relief, including rejection or compulsory withdrawal of the proposed tariff or the postponement or rescheduling of its effective date. (A. 361, 372, 423, 496; R.I. Nos. 12, 22-25, 28, 29, 31, 35, 36). In support of these prayers for relief petitioners presented to the Commission many of the arguments that they now make to this Court, including the argument that AT&T had not complied with the Statement of Rate-Making Principles.

¹⁴ Document entitled "Tariff F.C.C. No. 260 Private Line Services, Regulations and Rates to Become Effective November 1, 1969," p. 5, "Rate Adjustment Section." (A. 287).

The Commission responded to these pleadings in an order of October 29, 1969, (A. 558), which suspended the proposed rates for the full three-month statutory period, instituted an investigation into the lawfulness of the rates (directing that it be made in the previously instituted Docket No. 18128), and provided for accounting procedures so that, if the investigation should result in a determination that any of the increased rates were unlawful, refunds could be ordered for charges collected in excess of the lawful rate.¹⁵ The Commission's action was unanimous, except that Commissioners Cox and Johnson voted to suspend the new TELPAK rates for only one day, instead of the three months prescribed by the majority.

The Commission took note of the argument that the proposed rate increase violated the Statement of Rate-Making Principles and Factors. It held that it could not "agree with the petitioners' construction of the Statement." (A. 561). It also observed that the Statement "*per se* does not establish substantive rights and obligations which, if not observed, can be viewed as a breach of contract." (*Ibid.*). It said, however, that it would be "concerned" if any of the parties departed substantially from the import of the Statement, and added that any such alleged departures could be raised in the hearings in Docket No. 18128. (*Ibid.*).

With respect to the requests of TELPAK users for extraordinary relief, the Commission reiterated its earlier holding that it had no power to grant such relief pursuant to Sections 4(i) and 303(r) of the Act, and declined to decide whether it had such power under Section 203(b), 47 U.S.C. § 203(b). (A. 561-62). The Commission also

¹⁵ On April 1, 1970, AT&T distributed to the parties in this docket its written direct case in support of the TELPAK rate increase. Cross-examination on certain AT&T costs studies previously made available to the parties was originally scheduled to commence on February 17, 1970, but was postponed because of objections made by petitioners. FCC 70M-146.

held that, quite apart from the question of its authority to grant extraordinary relief, it would deny such relief because of the failure of the petitioners and others to present "sufficient circumstances that would require the extraordinary remedies they seek." (A. 562). The Commission referred to its prior deferral of proceedings in Docket No. 18128 and findings and determinations in Phase 1-B of Docket No. 16258 and the TELPAK Sharing Case (Docket No. 17457) and on the basis of intervening events in those proceedings directed that hearings in Docket No. 18128 go forward. (A. 563-64).

Subsequent to the Commission's order of October 29, 1969, certain of the petitioners and other parties filed petitions for reconsideration and other pleadings in which they renewed and amplified arguments that they had previously presented to the Commission. (A. 594, 605, 626, 646; R.I. Nos. 73, 77, 78). In addition certain of the petitioners sought relief on the ground that a press release issued by the Commission on November 5, 1969 (A. 572), showed that it had prejudged the lawfulness of the proposed TELPAK rate increases. This press release was the result of the following circumstances:

In 1969 the Commission, as a part of the continuing surveillance of AT&T's operations, instituted a comprehensive review of its interstate operations and earnings requirements.¹⁶ As a result of this review, AT&T informed the Commission in November 1969 that it would make reductions in rates, effective January 1, 1970, for interstate long distance telephone service that were expected to save users about \$150,000,000 per year. See Pub. Notice of November 5, 1969. (A. 572). The \$150,000,000 reduction was not dependent upon any proposed increase in TELPAK rates but was "completely independent of and un-

¹⁶ The nature of the Commission's surveillance procedure is described in *Public Utilities Commission of the State of California v. United States*, 356 F.2d 236 (9th Cir. 1966), *cert. denied*, 385 U.S. 816.

related to" the consequences of any such increase. (FCC Order of January 16, 1970, A. 725).

Apart from the Commission's comprehensive review of AT&T's interstate operations, AT&T had completed cost studies of TELPAK and other services, which had been undertaken pursuant to the Statement referred to above, pp. 9-10. It was as a result of those studies that AT&T filed the proposed rate adjustment for TELPAK to become effective on November 1, 1969, referred to above, and also filed proposed increases in the rates for its program transmission services to become effective October 1, 1969, and in its rates for teletypewriter exchange (TWX) service to become effective November 1, 1969. AT&T estimated that these rate adjustments would result in annualized increased revenues of approximately \$87,000,000.

In order not to affect the level of earnings to be achieved by the \$150,000,000 reduction resulting from the Commission's comprehensive review of AT&T's interstate operations and earnings requirements, as described above, AT&T determined to make further rate reductions for other services when the increased rates for TELPAK, program transmission and TWX services became effective. These rate decreases were made by adjustments in the rates for Message Telecommunications Service (MTS, *i.e.*, ordinary long distance service) and Wide Area Telephone Service (WATS), which it was estimated would reduce interstate revenues by approximately \$87,000,000, thus fully offsetting the rate increases referred to above. AT&T made these reductions with knowledge that the rate increases for TELPAK and other services had been made subject to investigation by the Commission and that the Commission might determine that some or all of the rate increases were unlawful and that refunds should be ordered. The Commission explicitly recognized that there might be re-

funds of all or part of the amounts collected under the increased rates for those services.¹⁷

In an order of January 16, 1970, (A. 724), the Commission considered the petitions and pleadings that had been filed subsequent to its order of October 29, 1969, and rejected the contentions that it had prejudged the lawfulness of the TELPAK rate increases. The Commission pointed out that its only concern in the comprehensive surveillance proceeding was with AT&T's overall rate of return from all of its interstate services; that its determination in that proceeding was "independent of and unrelated to" the \$87 million reduction in long distance telephone rates; and that the latter reduction was merely designed to ensure that the company's overall rate of return would not be increased as a result of any upward adjustments in the rates for TELPAK, TWX and program services. (A. 725).

The Commission held that the TELPAK increases were carrier-initiated rates, not prescribed or agreed to by the Commission, which "must withstand the statutory tests of Sections 201(b) and 202(a)," (A. 726), and that it had made "no decision as to the lawfulness of the TELPAK tariff offering or the specific rates provided for therein," (A. 728). It also held that if "the increased [TELPAK] rates are ultimately held to be unlawful, and a reduction

¹⁷ Chairman Burch stated in his concurring opinion to the Commission's Memorandum Opinion and Order of December 23, 1969 (A. 691):

"At that time even though the rate increases are subject to hearing and could be disallowed with refunds ordered, the Bell System agreed to put offsetting toll rate decreases in effect." (A. 698-99).

Commissioner Cox stated in his Further Concurring Statement, 21 F.C.C.2d 153, 157:

"He [Commissioner Johnson] also noted that Bell had agreed to file reductions in message toll rates, effective February 1, 1970, even though the increases in Telpak, TWX, and radio and television transmission rates have all been challenged and accounting orders issued by the Commission. This means that the increases may have to be refunded, though the company will have no corresponding right to recoup the sums lost through the message toll [MTS] reductions."

is ordered, a refund, with interest, of all increased amounts received by the carrier may be made," and that "AT&T has no resort to any argument that such rates were part of an offset arrangement." (A. 726-27).

The Commission again denied the motions of certain of the petitioners for rejection, further suspension, or stay of the effective date of the TELPAK rate increases, finding that there had been no presentation of "convincing evidence that irreparable injury will occur," such as would justify the exercise of any power that the Commission might have to grant this extraordinary relief. (A. 727).¹⁸ In this connection the Commission adverted to the fact that TELPAK users had been aware since February 1, 1968, that AT&T intended to increase the TELPAK rates and that the Commission had advised them that they should "prepare their communications budgets for the contingency of Telpak rates increases." (A. 728).¹⁹ In addition, the Commission rejected attacks made by certain parties on the level of the proposed rate increases by pointing out that they raised questions that could be decided only in a hearing on the lawfulness of the proposed rates. (A. 726).²⁰

The petitioners instituted proceedings in this Court to review the Commission's order on various dates between January 2 and January 5, 1970. Following briefing and oral argument, this Court denied petitioners' motions for interlocutory relief on January 29, 1970.

¹⁸ The Commission specifically noted that its denial of the extraordinary relief requested by petitioners should not be "considered dispositive of the extent of our authority with respect thereto." (A. 728).

¹⁹ Here again the Commission's statements negate petitioners' assertions that the Commission had recognized an "understanding" that there would be no increases in TELPAK rates until the issue whether the original rates were compensatory had been determined.

²⁰ The Commission also rejected arguments that the provisions of its accounting order were not effective to protect TELPAK users in the event that the proposed TELPAK rate increase should be held to be unlawful. (A. 729-31).

ARGUMENT

Introduction

As an introduction to this brief we should like to invite the Court's attention to a number of general considerations that cut across all of petitioners' arguments.

1. Petitioners are seeking extraordinary relief from this Court. They ask for a mandatory order commanding the Commission to reject the TELPAK rate increase or otherwise to suspend its effectiveness until the lawfulness of the rates has been determined.²¹ In short, the petitioners ask the Court not merely to set aside or annul the Commission's order but to dictate the decision that the Commission must make on remand.

2. The lawfulness of the level of the increased TELPAK rates is not in issue in this proceeding. That question must be determined initially by the Commission after a full hearing. Any argument that expressly or by implication attacks the level of the rates may therefore be disregarded. The only issue here relates to the Commission's determination on *the timing* of the rate increase.

3. Whatever authority the Commission may be assumed to have to suspend or summarily reject rate changes that will interfere with the proper discharge of its regulatory functions, the Commission here determined that there was no occasion for the exercise of that authority. In rejecting petitioners' prayers for relief, the Commission necessarily made a judgment that permitting the TELPAK rate increase to become effective on February 1, 1970, would not impede, disrupt or interfere with the Commission's administration of its statutory responsibilities. Plainly such a judgment by a regulatory agency is entitled to great weight.

²¹ Aerospace expressly states that it is seeking mandatory relief and that the Court should "direct the Commission to order AT&T to set aside the latest increase." Br. p. 46. The other petitioners seek essentially the same relief. Airlines Br. p. 50; NAMBO Br. p. 28; AP Br. p. 28.

4. In rejecting petitioners' prayers for relief, the Commission in the exercise of its discretion also made a judgment that there was no valid reason for additional delay in the effectiveness of the TELPAK rate increase. This judgment rested upon a considered appraisal of the history of the rate adjustment here in question. The rates now under attack are at the same level as those that were first proposed by AT&T on January 9, 1967. AT&T delayed more than a year in filing a tariff containing those rates in order to give TELPAK customers adequate time to prepare for a rate increase. Then in deference to the complaints of its customers AT&T withdrew the tariff and substituted lower interim rates, at the time announcing that it intended thereafter to establish the higher rate level it had initially proposed. In relation to the filing of the interim rate increases the Commission in 1968 warned TELPAK users that the legality of the rates was in question and that there was a substantial possibility that the Commission itself might require higher rates than those prescribed in the interim increase. Until the interim rates became effective on September 1, 1968, the petitioners and other TELPAK users had enjoyed the benefit of the lower TELPAK rates whose legality had been in serious question since 1961. It was in this context that the Commission weighed petitioners' complaints that the effectiveness of the rate increase should be deferred because allegedly they were the victims of "pyamiding" rate increases for which they had been given no adequate opportunity to prepare.

I. PETITIONERS HAVE NOT JUSTIFIED THEIR PRAYER THAT THIS COURT COMMAND THE COMMISSION TO REJECT THE TELPAK RATE INCREASE OR OTHERWISE SUSPEND ITS EFFECTIVENESS.

It has long been established that a court will not direct an administrative agency how to exercise the judgment or discretion reposed in it by Congress or dictate the content

of a decision that the agency may make in the exercise of that judgment or discretion, *United States, ex rel. Chicago, G. W. R.R. v. ICC*, 294 U.S. 50, 60; *ICC v. United States, ex rel. Waste Merchants Ass'n*, 260 U.S. 32, 34, and this rule applies whether the relief is sought by way of mandamus, on judicial review, or in some other form. See *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 317-18; *North Carolina Nat. Gas Corp. v. United States*, 200 F. Supp. 745, 752 (D. Del. 1961).

It follows that to justify their request that this Court command the Commission to reject or suspend the TELPAK rate increase, petitioners must show that the Commission's refusal to grant this relief was so plainly a violation of a direct statutory command that there was no room for any permissible exercise of judgment or discretion by the Commission. Petitioners have made no such showing.

The Commission's refusal to suspend or reject the rate increase was not a violation of any statutory command but an exercise of judgment well within the limits of the Commission's statutory authority. What the petitioners sought from the Commission was a deferral of the effectiveness of the TELPAK rate increase pending a determination of the lawfulness of the rates. The Commission has authority to grant this kind of relief by exercise of the suspension power given by Section 204 of the Act. Congress has imposed limitations on that power, but subject to those limitations its exercise is committed to the Commission's discretion.²² Section 204 does not require the Commission to suspend rates and if it refuses to do so the courts will not themselves directly exercise that power or command the Commission to do so. *Arrow Transportation Co. v.*

²² Section 204 places no limitations on the Commission's authority to refuse to suspend rate changes, but it does impose certain limitations on the authority to suspend; the Commission may suspend for not more than three months and if it suspends it must give the carrier a statement in writing of its reasons for doing so.

Southern Ry., 372 U.S. 658.²³ Indeed the courts will not even review a refusal to suspend. See pp. 44-45, *infra*.

Here the Commission exercised in full its suspension power by suspending the TELPAK rate increase for the entire three-month period permitted by Section 204. Even if it is assumed *arguendo* that the Commission has authority to suspend a rate change for more than three months—which we dispute—the rule of *Arrow* applies *a fortiori* and establishes that the courts will not interfere with a refusal to exercise this assumed authority. There is therefore no basis for any argument that the Commission was compelled to suspend the rate increase or that this Court may order it to do so.

Petitioners attempt to evade this difficulty by insisting that they are seeking rejection and not suspension of the rate increase. This is a wholly semantic device that does not advance petitioners' position. For one thing their prayer for rejection is in substance a prayer for suspension because it does not seek a final and absolute rejection of the rate increase but merely deferral of its effectiveness until the lawfulness of the rates has been determined. In short petitioners in reality seek relief that is equivalent to suspension and which is subject to the legal principles that apply to suspension.²⁴ But apart from this consideration, even if petitioners' request for rejection is assumed to

²³ In *Arrow* the Court held that the Commission "has the sole and exclusive power to suspend" (372 U.S. at 677) and that the courts are not authorized to exercise the suspension power either in the course of their normal equity jurisdiction or as an incident of their powers on judicial review. The Court noted that although on judicial review the courts have a limited power to preserve their jurisdiction or the status quo by injunction pending review, that authority may not be exercised to suspend rates because that would be "in derogation of . . . a clear Congressional purpose to oust judicial power." *Id.* at 671 n.22.

²⁴ Petitioners' own words show that they regard rejection as an equivalent or alternative to suspension; they describe rejection as a form of relief that would "prevent the increased rates from becoming effective" until the lawfulness of the rates has been determined. *Aerospace Br.* pp. 31, 37, 42; *Airlines Br.* p. 20.

differ in some respect from a request for suspension, they cannot avoid the fact that the request raised issues that were committed to the judgment and discretion of the agency. No provision of the Act, and no decisions interpreting and applying the Act, required the Commission as a matter of law to exercise its judgment and discretion in petitioners' favor or justify their prayer that this Court dictate to the Commission the decision it must make in the exercise of that judgment and discretion.

In large part petitioners' argument is an elaborate attempt to show that in this case the Commission had authority to reject the rate increase. Even if it is assumed that the Commission possessed the asserted authority, which we deny, petitioners must still show that the Commission had no legitimate area of choice but as a matter of law was compelled to exercise that authority in the way requested by petitioners. They cannot discharge this burden.

The basic infirmity in petitioners' argument is shown by their heavy reliance upon Sections 4(i), 203(b) and 303(r) of the Act. These sections cannot rationally be read as requiring the Commission to suspend or reject the TELPAK rate increase pending hearings on the lawfulness of the rates. Subject to certain limitations, these sections give the Commission authority which it may or may not use in the exercise of its judgment and discretion. To the extent that these sections confer any discretion upon the Commission, it exercised that discretion in addressing itself to the petitioners' argument that it had "plenary power" pursuant to these three sections to defer the effective date of the TELPAK tariff. The Commission stated that it was "not deciding at this time the extent of [its] authority to grant the kind of relief petitioners request," since it found "no necessity for the imposition of such extraordinary relief."²⁵ (A. 562).

²⁵ In its Opinion and Order on Reconsideration, the Commission again rejected the petitioners' request for extraordinary relief as not being "warranted in the circumstances of this case." (A. 728).

In fact, an examination of Sections 4(i), 203(b) and 303(r) shows that far from obligating the Commission to grant the relief requested by petitioners they do not even authorize that action. Section 4(i) and the pertinent part of Section 303(r) empower the Commission to perform acts, make regulations and issue orders "not inconsistent with" the Communications Act as may be necessary to carry out its statutory duties. The petitioners claim that these general provisions confer "broad powers" upon the Commission that allow it by suspension or interim rejection to postpone the effectiveness of a tariff for longer than three months in contravention of the provision in Section 204 that:

"[T]he Commission . . . may suspend the operation of [a tariff] . . . but not for a longer period than three months If the proceeding has not been concluded and an order made within the period of the suspension, the proposed [tariff] . . . shall go into effect at the end of such period"

But a statutory provision like Section 204, which deals expressly and specifically with an aspect of the Commission's regulatory responsibilities cannot be vitiated by reliance upon provisions that speak in only the vaguest generalities. *Fourco Glass Co. v. Transmirra Corp.*, 353 U.S. 222; *Maia-tico v. United States*, 112 U.S. App. D.C. 295, 300, 302 F.2d 880, 885 (1962).

Moreover, Sections 4(i) and 303(r) allow the Commission to act only in a way that is "not inconsistent with" the other provisions of the Communications Act. Deferring the effectiveness of a challenged tariff for more than three months in the face of Section 204 would be the baldest use of Sections 4(i) and 303(r) in a manner that is "inconsistent" with the Communications Act.²⁶

²⁶ None of the cases that the petitioners cite supports such an application of these sections. In *United States v. Southwestern Cable Co.*, 392 U.S. 157, the Supreme Court sustained the Commission's issuance of a temporary stay without a hearing under Sections 4(i) and 303(r) in the face of the hearing requirement for cease and desist orders set forth in Section 312(b) by

Section 203(b), the other provision relied upon by the petitioners to support their argument, provides that carriers must give 30 days notice before placing a rate into effect, but that "the Commission may, in its discretion and for good cause shown, modify" this requirement. The comparable provision in the Interstate Commerce Act is Section 6(3), 49 U.S.C. § 6(3). It provides that carriers must give 30 days notice before placing a rate into effect, but that the Commission "may, in its discretion and for good cause shown allow changes upon less than the notice herein specified." In this minor difference between the two acts, the petitioners purport to find a distinction between the FCC's alleged power to disregard the limitations upon its authority to defer the effectiveness of rates stated in Section 204 and the ICC's admitted lack of power to disregard the limitations upon its tariff suspension authority stated in Section 15(7). See *Long Island R.R. v. United States*, 193 F. Supp. 795, 800 (E.D.N.Y. 1961); *North Carolina Nat. Gas Corp. v. United States*, 200 F. Supp. 745, 750 n. 15 (D. Del. 1961).

Sections 203 and 204 of the Communications Act were taken from Sections 6(3) and 15(7) of the Interstate Commerce Act with the intention that there would be no difference in substance between the two acts. See S. Rep. No. 781, Committee on Interstate Commerce, U.S. Senate, 73d Cong., 2d Sess., p. 4 (1934); H.R. Rep. No. 1850, Committee on Interstate and Foreign Commerce, U.S. House of Representatives, 73d Cong., 2d Sess., p. 5 (1934); 78 Cong. Rec. 8824, 10313 (1934). Thus, Sections 203 and 204 of the Communications Act should be construed in *pari materia*

holding that the issuance of a temporary stay was not "in form or function, a cease and desist order." 392 U.S. at 180. *United States v. Storer Broadcasting Co.*, 351 U.S. 192, involved a Commission regulation of general applicability and did not hold that the hearing requirements of Section 309 would be necessarily inapplicable to specific license applications. 351 U.S. at 205. *Western Union Telegraph Co. v. United States*, 267 F.2d 715 (2d Cir. 1959), and *Metropolitan Television Co. v. FCC*, 110 U.S. App. D.C. 133, 289 F.2d 874 (1961), merely cited Sections 4(i) and 303(r) without in any way suggesting that they allow the Commission to ignore the express limitations upon its power contained in other provisions of the Communications Act.

with Sections 6(3) and 15(7) of the Interstate Commerce Act, and the petitioners' assertions concerning the differences between the powers of the ICC and the FCC should be rejected. *Stanley v. Western Union Tel. Co.*, 23 F. Supp. 674, 675 (S.D. Fla. 1938); *Curran v. Mackey Radio & Tele. Co.*, 123 F. Supp. 83, 89 (S.D.N.Y. 1954). *Cf. ICC v. Parker*, 326 U.S. 60, 65.

The decisions relied upon by petitioners do not support the argument that the Commission was required as a matter of law to suspend or reject the TELEPAK increase pending the completion of a hearing on its lawfulness. These decisions hold only that an agency has the power and in some cases the duty to reject a tariff that is demonstrably unlawful on its face because directly in conflict with a statute, agency regulation or order; or with a rate fixed in a statutorily sanctioned contract; or because the tariff contains rates whose lawfulness depends upon valid prior agency approval which has not been obtained.²⁷

These grounds of illegality do not exist in this case. The objections raised by the petitioners to the TELPAK tariff pertain only to its timing, *i.e.*, that it should have been suspended or rejected pending the Commission's completion of its hearings on TELPAK rates. The petitioners do not argue that the rates are inherently unlawful or inconsistent with any contract fixing specific rates. They do not and cannot suggest that any provision of the Act made the lawfulness of the TELPAK rates depend upon prior Commission approval or required AT&T to get special authority from the Commission prior to filing a tariff for those rates.

²⁷ *Permian Basin Area Rate Cases*, 390 U.S. 747 (see discussion p. 26 n.29); *FPC v. Hunt*, 376 U.S. 515 (see discussion p. 26 n.29); *Amerada Petroleum Corp. v. FPC*, 293 F.2d 572 (10th Cir. 1961), *cert. denied*, 365 U.S. 976 (tariff filing contrary to FPC regulation barring tariff change during the pendency of prior suspension period); *United Gas Co. v. Mobile Gas Corp.*, 350 U.S. 332 (see discussion p. 47); *Isbrandtsen Co. v. United States*, 93 U.S. App. D.C. 293, 211 F.2d 51 (1954), *cert. denied*, 347 U.S. 990 (see discussion p. 48); *Seatrains Lines, Inc. v. United States*, 168 F. Supp. 819 (S.D.N.Y. 1958) (rates unlawful under Section 4 of the Interstate Commerce Act without prior ICC approval).

II. THE COMMISSION WAS NOT REQUIRED TO REJECT OR TO DEFER THE TELPAK RATE INCREASE

A. The Commission Was Not Required To Reject the Second Phase of the TELPAK Rate Increase Merely Because Its Hearings on the Interim TELPAK Increase Had Not Been Completed.

The Airlines assert that:

“[w]hen AT&T has proposed to raise TELPAK rates while issues on the propriety of lower rates were undetermined, and it was already earning in excess of its authorized rate of return, it is submitted that it was arbitrary and capricious for the Commission not to reject the further rate increases until some decision had been made on the underlying unresolved issues.”
Br. pp. 31-32.

This argument rests largely upon the assertion that AT&T was earning more than its authorized rate of return. If a regulatory agency should reject a tariff on such grounds, it would in effect determine the lawfulness of the level of the rates without a hearing. But the FCC, like the ICC under the corresponding provision of the Interstate Commerce Act, has no power summarily to reject rates as unlawfully high. *North Carolina Nat. Gas Corp. v. United States*, 200 F. Supp. 745, 750 (D. Del. 1961); *Rardin Grain Co. v. Illinois Central R.R.*, 288 F. Supp. 813 (S.D. Ill. 1968). Cf. *Willmut Gas & Oil Co. v. FPC*, 111 U.S. App. D.C. 49, 52-53, 294 F.2d 245, 248-49 (1961), *cert. denied*, 368 U.S. 975.

The Commission's lack of power to reject a rate prior to a hearing on the ground that it is unlawfully high because contributing to an excessive rate of return necessarily bars a court from deciding that the Commission should have rejected the rate on that ground without a hearing. To allow judicial consideration of the level of the rates prior to the Commission's full consideration of that matter would invade the primary jurisdiction of the Commission and do violence to the statutory scheme. *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426; *United States v. Western*

Pac. Ry., 352 U.S. 59. See also, *Ambassador, Inc. v. United States*, 325 U.S. 317, 324.

The petitioners seek to leave the impression that the Commission has already decided that AT&T is now earning above its authorized rate of return. The Commission has just held flatly to the contrary. 20 F.C.C.2d 886, 889-90 (1970). (A. 694-95).²⁸

With the Airlines' assertions about AT&T's overall rate of return put aside, their argument for rejection necessarily rests upon the broad proposition that the Commission had to reject the second phase of the TELPAK increases because it had not yet passed upon the lawfulness of the interim increase.

There is no general principle of law that a proposed rate increase is improper and should be rejected merely because the lawfulness of a prior rate increase has not been finally determined. On the contrary, this Court has held that under statutory provisions similar to those of the Communications Act, a regulated company may in such circumstances file a rate increase and the agency has no general authority to reject it. See *Willmut Gas & Oil Co. v. FPC*, 111 U.S. App. D.C. 49, 54, 294 F.2d 245, 250 (1961), *cert. denied*, 368 U.S. 975.²⁹

Even assuming *arguendo* that an agency in some circumstances might have authority to reject a rate increase pending a final determination of the lawfulness of a prior in-

²⁸ Since the second phase of the TELPAK increase is intended to be fully offset by AT&T's reductions in rates for other telephone services (MTS and WATS), the assertion that the present rate increase would raise AT&T's overall rate of return is without foundation.

²⁹ The principle of the *Willmut* case is not in any way impaired by *Permian Basin Area Rate Cases*, 390 U.S. 747, *FPC v. Hunt*, 376 U.S. 515 and other similar decisions under the Natural Gas Act cited by petitioners. Those cases did not involve the rejection of rate increases because of the pendency of uncompleted investigations relating to the lawfulness of prior increases. In those cases the FPC after a full hearing had prescribed specific rates either in the exercise of its statutory power of prescription or as a condition to the granting of certificates of convenience and necessity. The regulatory orders sustained in the cases were an exercise of the agency's authority to prohibit or control changes in rates that had been specifically prescribed.

crease if it properly found that the subsequent rate increase would interfere with the discharge of the agency's regulatory responsibilities, it is not necessary to consider here the existence or limits of any such power or the facts that might justify its exercise. The Commission here found that the TELPAK rate increase would not interfere with its regulatory functions.³⁰ This judgment was fully justified on the basis of two significant circumstances which are peculiar to this case:

First, the TELPAK increase filed in October 1969 was only the second step in the implementation of an increase in the general level of TELPAK rates that was proposed in January 1967. AT&T filed the interim rate increase in March 1968 to aid TELPAK customers in making the transition from the lower rates to the ones now under attack. When the Commission suspended this March 1968 interim increase, it was familiar with these facts and its suspension and hearing order on the interim rates did not state or even suggest that AT&T was precluded from filing subsequent rate increases in accordance with its original January 1967 proposal. See p. 6 n.6, *supra*.

Secondly, the Commission expressly indicated that the filing of further TELPAK rate increases would not disrupt its tariff-investigation processes, by declaring that it expected rate adjustments for TELPAK. In its Memorandum Opinion and Order of July 29, 1969, (A. 214) the Commission recognized that AT&T would file TELPAK rate adjustments by October 1, 1969, and stated that the lawfulness of these adjustments would be resolved in pending Docket No. 18128. Thus, contrary to the impression that the petitioners try to create, the rates now under attack do

³⁰ Petitioners refer to the order issued by the Commission limiting Western Union's right to make further changes in rates during the pendency of a proceeding involving those rates. See, e.g., *Airlines Br.* p. 44. The legality of the Commission's order in that case has not been tested. That order was issued after Western Union had filed a series of increases following the commencement of the hearing and clearly represented a judgment by the Commission that the repeated rate changes would interfere with its pending investigation. The Commission here made a contrary judgment.

not constitute an unexpected and unwarranted "pyramiding" of one increase on top of another.

B. The Commission's Deferral of Its Investigation Under Section 204 Until Completion of a Pending General Investigation of Rates Under Section 205 Did Not Require Rejection of a Subsequent Carrier-Initiated Rate Increase.

The arguments made in the preceding section apply with equal force to the general complaint of Aerospace that the Commission refused to reject or suspend the second phase of the TELPAK rate increase pending a final determination of the lawfulness of the interim increase. Aerospace, however, attempts to refine the "pyramiding" argument by reliance upon that part of Section 204 which provides that the Commission must decide proceedings involving rate increases "as speedily as possible" by giving "to the hearing and decision of such questions preference over all other questions pending before it." Aerospace argues that the Commission disregarded this provision of Section 204 in 1968 by deferring the investigation of the interim TELPAK rates under Section 204 (Docket No. 18128) until the completion of its general investigation of AT&T's interstate rates under Section 205 of the Act (Docket No. 16258). Aerospace Br. pp. 12-13. On the basis of this alleged error, Aerospace contends that the Commission was required to reject subsequent TELPAK rate increases pending the completion of the proceedings concerning the interim TELPAK rates.

For reasons that will be stated below, we submit that in fact the Commission did not disregard the command of Section 204. But even if a contrary conclusion is assumed *arguendo*, it does not follow that the Commission's violation of Section 204 would require or even authorize it to reject or suspend indefinitely the TELPAK rate increase. The purpose of the relevant provisions of Section 204 is to ensure expeditious consideration and disposition of proposed increases in rates. It is the Commission and not the carrier which has both the responsibility and the capacity

for compliance with Section 204.³¹ Yet it is the carrier and not the Commission which would bear the burden of a rejection or an indefinite suspension of rates.

The Aerospace argument attempts to extrapolate from an asserted violation of Section 204 a remedy that is not rationally related to the error alleged. Rejection of the tariff would not retroactively cure the Commission's alleged failure in 1968 to give petitioners a speedy hearing or assure them of a speedy hearing in the future.

The appropriate remedy for an alleged violation of Section 204 is an application to a court for an order requiring the agency to expedite the proceeding. See *Deering Millikin, Inc. v. Johnston*, 295 F.2d 856 (4th Cir. 1961). The remedy does not lie in requiring the dilatory agency to reject or suspend a subsequent rate increase any more than it would lie in requiring the agency to terminate the delayed proceeding. *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 305 F.2d 242 (5th Cir. 1962); *M. G. Davis & Co. v. Cohen*, 256 F. Supp. 128, 133 n.7 (S.D. N.Y.), *aff'd*, 369 F.2d 360 (2d Cir. 1966).

Aerospace has never pursued the appropriate remedy either before the Commission or in the courts but has consistently used the alleged Section 204 violation as an argument for rejection or suspension of the rates here in issue. It is difficult to avoid the impression that the petitioners have been more interested in enjoying the benefits of the lower TELPAK rates than in obtaining a speedy hearing on those rates.³²

³¹ The Aerospace argument on Section 204 depends largely on the fact that in July 1968 the Commission deferred the proceedings in Docket No. 18128 until the conclusion of its general investigation in Docket No. 16258. See pp. 7-8, *supra*. This procedural step was taken by the Commission on its own initiative and not in response to any request by AT&T.

³² Thus, it is significant that following the Commission's order of July 10, 1968, none of the petitioners specifically asked the Commission to reverse its determination to defer the hearings in Docket No. 18128 and to order a speedy hearing in that docket. Aerospace, although objecting to the deferral of the hearings, did so by asking the Commission to suspend or defer the effective date of the interim increase beyond the three month period provided by the statute. (Aerospace Petn. of Aug. 6, 1968, R.I. No. 153). Neither Aerospace nor any of the other petitioners at that time sought any form of judicial relief from the Commission's action.

In its desire to restore the lower level of the prior TELPAK rates Aerospace has apparently overlooked the bizarre aspects of its argument. It is an argument that an agency's violation of its own statute creates additional extraordinary power and requires the agency to apply that power even though its exercise will not remedy the violation. As applied to the specific facts here it is an argument that the Commission by violating one part of Section 204 can "bootstrap" itself into a position whereby it can and indeed must ignore the limitations upon its power to reject or suspend rate increases that are set forth in other parts of that section.

So far we have considered the Aerospace argument on the *arguendo* assumption that the Commission did not comply with Section 204. In fact, this assumption is unwarranted because the Commission's procedural steps were in conformity with Section 204 and with the Commission's previous interpretation of that section.

In *American Telephone & Telegraph*, 26 F.C.C. 101 (1959), the question arose whether Section 204 required that a case arising under its provisions be expedited by being heard in a separate docket instead of being combined with a pending general investigation. The Commission rejected the argument that the "speedy hearing" provision of Section 204 required it to hear the Section 204 case prior to a thorough general inquiry under Section 205:

"As we construe section 204 of the act, it merely requires that the questions pertaining to increased rates shall be decided as speedily as possible. It does not mean that we must sacrifice an adequate record in the interest of expediting a determination as to the lawfulness of any rate or that we may ignore other pertinent considerations which may be involved." 26 F.C.C. at 103.

Similar considerations justified the Commission's decision to defer its investigation of the interim TELPAK rates pending its consideration of basic issues affecting

those rates in its general investigation in Docket No. 16258. The Commission's explanation shows that it had substantial rational grounds for refusing the petitioners' requests to consolidate the investigation of the interim TELPAK rates into the Commission's general investigation. The Commission stated that it was necessary for it first

"to determine in Phase 1-B [of the general investigation] the broad revenue objectives that are to be met by the rates for a given classification of service in terms of its contribution to the total interstate revenue requirements of Respondents [AT&T et al.]. The consolidations urged by Petitioners [of the Section 204 TELPAK inquiry into the general investigation] would, in our opinion, defeat these objectives by encumbering [the general investigation] with the separable and time-consuming task of examining and passing upon the propriety of the internal design or detailed components of the rate structure of a particular class of service." (A. 179-180).

* * * * *

"Thus, with respect to Respondents' rates for TELPAK service, . . . we will determine in Phase 1-B of [the general investigation] whether competitive or other valid considerations justify the pricing discrimination existing in the TELPAK offering; and, if so, whether Respondents' existing or proposed rates for TELPAK will make an appropriate contribution to Respondents' total interstate revenue requirements. These determinations with respect to the revenue objectives appropriate to TELPAK and other services are, in our opinion, of threshold essentiality to a determination of the reasonableness and lawfulness of the specific rates and rate relationships within the individual rate structures." (A. 180).

The Commission's decision that it could best judge the lawfulness of the TELPAK rates after conducting its general investigation and that the general investigation would be encumbered by a specific inquiry into the interim TELPAK rates is not only supported by prior Commission con-

struction of Section 204, but also is sustained by Section 4(j) of the Communications Act, 47 U.S.C. § 154(j) :

“The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.”

The courts have consistently held that under Section 4(j) the Commission may arrange its docket in such manner as it believes will best allow it to carry out its obligations under the Communications Act and that courts will not second guess the Commission as to how it should order its docket. *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138; *FCC v. WJR*, 337 U.S. 265, 282-83; *FCC v. Schreiber*, 381 U.S. 279, 289; *Buckeye Cablevision, Inc. v. FCC*, 128 U.S. App. D.C. 262, 269, 387 F.2d 220, 227 (1967). Yet that is precisely what the Aerospace petitioners ask this Court to do in arguing that the Commission erred as a matter of law in deferring the Section 204 case.

Aerospace's attack on the Commission's ordering of its docket takes an overly simplified view of the task that the Commission faced. The Commission had to resolve a difficult and complex regulatory problem involving questions about the relationship between the TELPAK rates and AT&T's rates for other services, the general rate-making principles that should be applied in considering these relationships, and the lawfulness of the TELPAK rates themselves. Intricate questions of costing principles and an appraisal of competitive and other market conditions were also involved. As to these and other matters a large number of parties pressed various and conflicting views upon the Commission. In these circumstances the procedure adopted by the Commission can reasonably be regarded as evidencing a desire by the Commission to discharge its responsibilities in a careful and conscientious manner; it was not a procedure that violated the letter or the spirit of Section 204.

C. The Petitioners' Argument on Prejudgment Does Not Support Their Request That This Court Order the Commission To Reject the TELPAK Rate Increase.

Petitioners argue that this Court should order the Commission to reject the TELPAK rate increase because the Commission has prejudged the question of the lawfulness of the rates involved. There are two threshold objections to this argument:

The first is that this Court has held that it is premature to raise claims of prejudice prior to a hearing and determination of the issue as to which prejudice is alleged and that the claim of prejudice should be reserved for consideration on review of the agency's decision following a hearing. See *National Lawyers Guild v. Brownell*, 96 U.S. App. D.C. 252, 255, 225 F.2d 552, 555 (1955), *cert. denied*, 351 U.S. 927; *SEC v. R. A. Holman & Co.*, 116 U.S. App. D.C. 279, 323 F.2d 284 (1963), *cert. denied*, 375 U.S. 943.

The second objection is that petitioners' argument, if accepted, would lead to disqualification of the entire Commission, since petitioners allege in substance that they can never obtain a fair hearing from the Commission on the lawfulness of the TELPAK rate increase.³³ Both common sense and authority require the rejection of this sweeping claim that would frustrate the administration of the statute and the purpose of Congress by disqualifying the only body authorized to determine the lawfulness of the rates in question. *FTC v. Cement Institute*, 333 U.S. 683, 701-03; 2 Davis, *Administrative Law* § 12.04. This is particularly true in the instant case since there has been no final determination by the Commission of the issue it is alleged to have prejudged, and the petitioners still have available their right to judicial review of any final determination that the agency may make.

Apart from the legal infirmities in the petitioners' prejudgment argument, it has no basis in fact. In arguing that

³³ See, e.g., *Airlines Br.* p. 26—"The inference is compelling that the Commission is 'locked into' support of the TELPAK rate increases as part of its over-all agreement with AT&T, and to keep the MTT rate reductions which it was pleased to announce."

the Commission improperly commingled its continuing surveillance of AT&T's rates with its adjudicative obligations under Section 204 concerning TELPAK, the petitioners attempt to leave the impression that AT&T's reduction of long-distance telephone rates to offset increased revenues from TELPAK and certain other services was part of the overall reduction in interstate rates agreed to by the Commission and AT&T in the Surveillance proceeding. In fact, as pointed out above, pp. 13-16, AT&T's decision to file offsetting decreases in MTS and WATS rates was not a part of its agreement with the Commission for a general reduction in its revenues, but rather was designed only to insure that the upward adjustment of rates for TELPAK and certain other services would not affect the \$150 million downward adjustment agreed to by the Commission and AT&T in the Surveillance proceeding. In these circumstances no provision of the statute and no consideration of sound regulatory policy required the Commission to reject the proposed rate increase or to suspend its effectiveness until its lawfulness had been decided.

Moreover, the Commission stated explicitly and unambiguously that it had made no decision as to the lawfulness of the TELPAK rate increase and that there was no relationship between the offsetting reductions in MTS and WATS rates and the TELPAK increase that would affect that decision. See pp. 15-16, *supra*. Unless these statements of the Commission are to be disregarded as unworthy of belief, they completely dispose of petitioners' claim of prejudice.

Petitioners attempt to bolster their argument on prejudice by referring to statements made by Commissioners Cox and Johnson in dissenting to the Commission's decision to suspend the TELPAK rate increase for the full three-month period permitted by Section 204. In these statements the two Commissioners expressed views that there had long been a question whether TELPAK rates were unlawfully low, that TELPAK users had been on notice for years as to the Commission's concern about TELPAK

rates, and that accordingly there was no basis for the full three-month suspension imposed by a majority of the Commission. In challenging these expressions of opinion by the dissenting Commissioners, the petitioners are in effect arguing that when a regulatory agency has the obligation to consider the merits in order to make preliminary rulings, members of the Commission may not express their tentative views of the merits, since to do so is to prejudice irretrievably the disposition of the merits upon a hearing. But both courts and agencies are regularly required to dispose of preliminary questions that involve a view of the merits—the disposition of motions for summary judgment; the issuance of judicial stays pending appeals from administrative orders; the designation of administrative proceedings for hearing. Petitioners fail to cite a single instance where such court or agency action or where the expression of opinions in such circumstances has been held to preclude the possibility of a fair hearing.³⁴ *Cf. FTC v. Cement Institute*, 333 U.S. 683, 701.

The petitioners principally rely on two decisions of this Court to support their claims that the TELPAK rate increases should be rejected because of alleged prejudgment—*Cinderella Career & Finishing Schools, Inc. v. FTC*, — U.S. App. D.C. —, — F.2d — (Case No. 22,624, decided March 20, 1970); *Texaco, Inc. v. FTC*, 118 U.S. App. D.C. 366, 336 F.2d 754 (1964), *remanded on other grounds*, 381 U.S. 739. These cases are distinguishable on three grounds:

In both cases (1) the issue of prejudgment was decided by the court on judicial review of final agency action and not in advance of that action; (2) the relief requested was merely the disqualification of a single member of a regulatory agency; and (3) the prejudicial statements, unlike the dissenting opinions here and the Commission's action with

³⁴ Indeed, in this very case the petitioners unsuccessfully argued for interlocutory relief pending appeal by advancing to a panel of this Court virtually every argument that they now put forward on the merits, yet they have not suggested that the panel which preliminarily rejected those arguments would be prejudiced in a full argument of the merits.

respect to the offsetting reductions, were not made in the course of discharging statutory duties.

The significance of the first two of these distinctions has been discussed at p. 33, *supra*. The importance of the third distinction is indicated by cases such as *Pangburn v. CAB*, 311 F.2d 349 (1st Cir. 1962), where the CAB was held to be capable of providing a fair hearing on the suspension of a pilot's license, even though in a prior statutory investigation it had found that pilot error was a contributing cause of the accident which underlay the suspension hearing:

"If we were to accept petitioner's argument, it would mean that because the Board obeyed the mandate of Section 701, it was thereupon constitutionally precluded from carrying out its responsibility under Section 609." 311 F.2d at 358.

The same observation applies to the claims made by petitioners here concerning the alleged prejudice arising from both the Commission's acceptance of an offsetting rate reduction tariff filed by AT&T and the dissenting views expressed by Commissioners Cox and Johnson. See also, *FTC v. Cement Institute*, 333 U.S. 683, 700-03; *Southern Ry. v. United States*, 186 F. Supp. 29, 41 (N.D. Ala. 1960), *aff'd*, 294 F.2d 850 (5th Cir. 1961).

D. The Commission Properly Refused To Reject the TELPAK Rate Increase on the Basis of Petitioners' Arguments Relating to the Statement of Rate-Making Principles.

The petitioners argue that the Commission erred as a matter of law in refusing to reject the TELPAK rate increases for AT&T's asserted failure to comply with certain procedural provisions in the Statement of Rate-Making Principles, see pp. 9-10, *supra*. The provisions of the Statement on which petitioners rely concern procedures for developing studies of long-run incremental costs and fully distributed costs, which the Statement recognized AT&T would make in consultation with the Commission staff and

TELPAC users prior to filing any new rate proposals.³⁵ After referring to these studies, the Statement provided (A. 220):

"By such formal or informal procedures as the Commission deems appropriate, interested persons will be afforded a timely opportunity to express their views with respect to the formulation of the appropriate methods [for determining long-run incremental costs and fully distributed costs]." (A. 222).

* * * * *

"No carrier initiated rate level increases will be filed until the new cost studies described in paragraph (2) have been completed and made available to the parties hereto." (A. 224).

Petitioners do not deny that before filing the TELPAK rate increase AT&T completed the new cost studies referred to in the Statement and made them available to the parties. They contend, however, that they were not given an adequate opportunity to express their views with respect to the formulation of the cost studies and that AT&T did not allow the petitioners enough time to analyze the studies prior to the filing of the rate increase.

The Commission refused to reject the TELPAK rate increases on the basis of these arguments, holding:

"We fail to find any contractual rights and obligations flowing to, from, or between the parties involved. . . . This is not to suggest that we would not be concerned if any of the parties departed substantially from the import of this accord. . . . The parties who allege certain departures from the accord may raise questions in docket No. 18128 with respect thereto." (A. 561).

³⁵ The Statement, which expressly recognized that it was cast "in general terms" (A. 221) contained no agreement on specific rates and therefore did not resemble in any way the rate contracts involved in the cases arising under the Natural Gas Act cited by petitioners. Moreover, unlike those contracts, which were recognized and sanctioned by the Natural Gas Act, the Statement had no statutory contractual status under the Communications Act. See *United Gas Co. v. Mobile Gas Corp.*, 350 U.S. 332, 338.

The Commission's decision was correct. Clearly the Statement gave rise to no substantive right in the petitioners to have the filing of the TELPAK rate increase rejected summarily by the Commission. On the contrary, the Statement expressly noted that the parties did not agree as to the scope of the Commission's authority to reject or postpone the effectiveness of carrier-initiated rates and that no party waived its position on that question. (A. 224-25).

The Statement was prepared with the full participation of the FCC staff and was placed before the Commission for its scrutiny prior to its termination of Phase 1-B of the general investigation of AT&T's interstate rates. In these circumstances, the Commission's decision that an alleged breach of the Statement did not give rise to a substantive right to have the rate increase rejected prior to hearing is entitled to great weight. *Cf. Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481, 496-99.

The Commission was also correct in resting its decision upon the prematurity of petitioners' arguments for rejection, as is demonstrated by the very nature of those arguments. To determine whether AT&T did afford a timely opportunity to the parties to express their views with respect to the methodology used in the cost studies, it is obviously necessary to develop a record with respect to what meetings between AT&T and TELPAK users were in fact held and what was accomplished at those meetings. It would have been improper for the Commission to have made findings on these questions of fact merely on the basis of the petitioners' generalized charges as to the insufficiency of their opportunity to comment upon the cost studies.

In a full evidentiary hearing AT&T would be in a position to prove that on at least ten different occasions subsequent to the Statement—June 10, 11, 19, 30, July 16, 28, September 4, 10, 18, 19, 1969—it met in sessions attended by TELPAK users and that these sessions were well publicized in the industry and were open to all TELPAK users. AT&T would further offer to prove that at these meetings

there was a full and free discussion concerning the development of cost studies.³⁶

In addition, AT&T would show that the basic methodology of the market study was furnished to interested TELPAK users on June 30, 1969, that preliminary results of the study were furnished to the Airlines as early as September 10 and to other TELPAK users on September 18, and that copies of AT&T's cost studies with respect to program transmission services (which involved the same general methodology as the TELPAK cost studies) were furnished to interested TELPAK users prior to August 29.

If petitioners have any evidence that would contradict or qualify the facts stated above, they would, of course, be free to present it to the Commission at a full evidentiary hearing. But in advance of such a hearing and the full development of the facts, petitioners were not entitled to insist that the Commission was required as a matter of law to reject the TELPAK rate increase for AT&T's alleged failure to comply with the procedure contemplated by the Statement.³⁷

The Commission likewise properly refused prior to the hearing to pass upon petitioners' contention that AT&T did not comply with the Statement because the cost studies were not made available sufficiently in advance of the tariff filing. The Statement provides only that "no carrier initiated rate level increases will be filed until the

³⁶ For example, AT&T would offer in evidence the letter of William E. Miller, on behalf of the Air Transport Ass'n, to the Chief of the Commission's Common Carrier Bureau, dated July 2, 1969:

"We agree that the informal conferences to date, both general and specific, have been constructive, and have served to allay some but by no means all of our misgivings in this regard. Based on what we know, we believe that the methodology is being considerably improved, but whether it will be improved to the point of resulting in a truly incremental cost study (LRIC), within the meaning of the agreed upon principles of procedures, remains to be seen."

³⁷ This is particularly so, since the Statement did not specify the procedures to be used for the petitioners to express their views concerning AT&T's cost studies, but rather provided for only those procedures that the Commission "deems appropriate." (A. 222).

new cost studies . . . have been completed and made available to the parties hereto." (A. 224). AT&T complied with this provision because it admittedly furnished copies of the cost studies to TELPAK users prior to the filing of the TELPAK rate increase. Petitioners, however, argue that if this provision of the Statement is "to be meaningful" something more than compliance with its terms is required and that AT&T should have submitted the studies far enough in advance of the tariff filing so that the studies could be "assimilated, tested, probed, evaluated, discussed, and, where appropriate, modified." Airlines Br. p. 34.

This argument simply reads into the Statement a provision that it does not contain. Moreover, the argument improperly assumes that despite the meetings with TELPAK users, referred to above, petitioners did not have an adequate opportunity to discuss and consider the cost studies prior to the tariff filing and that they have been prejudiced as a result. This assumption rests on disputed issues of fact and could not serve as a basis for Commission rejection of the tariff prior to a full hearing.

E. The Commission's Order Should Not Be Set Aside on the Ground That in Refusing To Reject the TELPAK Tariff the Commission Misapplied Its Own Regulations.

Petitioners argue that the Commission abused its discretion and erred as a matter of law in refusing to reject the TELPAK tariff for failure to comply with the Commission's regulations. Specifically, they argue that AT&T did not file materials that provided a "*prima facie* justification" for the change in telegraph/telephone equivalency from 6:1 to 2:1. AP Br. p. 17; Airlines Br. p. 37.

The regulation that the petitioners urge was misapplied by the Commission provides that tariff filings must be accompanied by a letter of transmittal that includes

" . . . a showing in detail of the reasons for all changes in charges or regulations and in case any

such change results in increased charges, the facts upon which the carrier relies in justification thereof.”
47 C.F.R. § 61.33(a).

This regulation plainly does not require a *prima facie* showing of the lawfulness of the rate change. It was designed simply to aid the Commission in deciding whether to order a hearing on the lawfulness of proposed rates or to suspend rates for the three-month period prescribed by Section 204. In the exercise of this discretion the Commission is not required to make a *prima facie* or preliminary determination of the lawfulness of a rate change.

The Commission’s interpretation of its own regulation and its determination that the material accompanying the TELPAK tariff complied with the regulation are entitled to great weight and should be accepted. *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 n. 6. This is particularly true here because “unlike some rules the present ones are mere aids to the exercise of the agency’s independent discretion” and are “not intended primarily to confer important procedural benefits upon individuals.” *American Farm Lines v. Black Ball Freight Service*, — U.S. — (decided April 20, 1970) Slip Op. pp. 6-7. That being the case,

“the Commission is entitled to a measure of discretion in administering its own procedural rules in such a manner as it deems necessary”

* * *

“[T]here is no reason to exempt this case from the general principle that ‘[i]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it’.” *Id.* at Slip Op. 6-7.

The petitioners’ attempt to show that the Commission abused its discretion in refusing to reject the tariff rests

ultimately upon the bald assertion that carriers filing rate increases must make a "*prima facie*" showing that the increase will be just and reasonable under Sections 201 and 202 of the Communications Act. See AP Br. pp. 12, 17-18. Nothing in the Commission's rules nor in decisions under the Communications Act or any similar regulatory statute supports this assertion.³⁸

Having based its argument upon an erroneous legal proposition, AP then misapplies that proposition to the facts. The new equivalency ratio made two telegraph channels equal to one telephone channel in ordering TELPAK base capacity. AT&T justified this equivalency on the ground that the ratio between the costs of telephone and telegraph channels in the TELPAK offering "is slightly under 2 to 1." (A. 288). AP attacks this justification on the ground that it is inconsistent with the relative amounts of revenue derived from telephone and telegraph services in "two representative TELPAK C sections of 100 miles in length." AP Br. p. 19.

But AP's illustration of "two representative TELPAK C sections" grossly understates the average length of telegraph circuits priced in TELPAK. AP's example involves 50 miles of interexchange channel mileage per service terminal (100-mile section length divided by two service terminals per circuit), which contrasts with an actual average of 263 miles per service terminal. Had AP used a 500-mile TELPAK C section (250 miles per terminal) in its illustration of the 2:1 equivalency ratio, the revenue per telephone channel would have been \$487 and the revenue per telegraph channel \$278, or the telegraph

³⁸ *United Gas Co. v. Mobile Gas Corp.*, 350 U.S. 332, the only case cited by AP for this assertion (AP Br. p. 12), does not hold that a tariff filing must make a *prima facie* showing that the increased rate will be just and reasonable. The tariff in that case was unlawful on its face under the Natural Gas Act because it was in conflict with a valid pre-existing rate contract between the carrier and its customers. In the absence of that conflict the tariff filing would have been lawful under the Natural Gas Act and the agency would have had no authority to reject it. See *United Gas Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103, 113.

revenue per channel would have been approximately 57 percent of telephone revenue per channel. This revenue relationship closely corresponds to a cost relationship of telephone to telegraph of "slightly under 2 to 1." Thus, by substituting realistic figures for the ones arbitrarily chosen by AP, it can be seen that the revenue generated by a 2:1 equivalency is entirely consistent with the cost justification relied upon by AT&T as the basis for the change.

AP also argues that the equivalency change was arbitrary and unlawful. For example, AP asserts that a 2:1 equivalency constitutes an "arbitrary limitation of carrier spectrum" "to only one ninth of the 240 kHz bandwidth."³⁹ AP Br. p. 21. AP's assertion that the equivalency ratio is "arbitrary" is nothing less than a premature attack on the substantive legality of the tariff. But even AP admits that there are cases which hold that regulatory agencies "cannot summarily reject [tariffs] before a hearing on the *substantive issue of reasonableness*." AP Br. p. 16 (emphasis in original).

AP's attack upon the Commission's alleged failure to deal with AP's arguments for rejection of the rates is similarly without merit. The Commission expressly held that "the revised tariff schedules for Telpak, while raising questions that may be explored in hearing, can not be construed as being so defective as to require rejection." (A. 561). This statement adequately dealt with AP's arguments. Those arguments were directed to the issue whether AT&T had complied with the tariff regulation by giving the Commission enough information to enable it to exercise its statutory powers to suspend the tariffs and institute an investigation. When the Commission stated that the tariff was not so defective as to

³⁹ This argument is based upon an erroneous factual assumption. Under the TELPAK tariff individual channels may be ordered in TELPAK up to the maximum available in the base capacity selected (C or D), but the customer has no claim on, nor is AT&T obliged to furnish and equip, any amount of "bandwidth" beyond that actually required to furnish the channels ordered.

require rejection, it plainly held that the tariff material was sufficient to enable the Commission to discharge these statutory obligations. It was not required to say more.⁴⁰

III. THE COMMISSION'S ORDER REFUSING TO REJECT THE TELPAK TARIFF SUMMARILY OR TO SUSPEND ITS EFFECTIVENESS FOR MORE THAN THE PERIOD PRESCRIBED BY THE ACT IS NOT REVIEWABLE.

Under 28 U.S.C. § 2342(1) only "final orders" of the Commission are reviewable. The Commission's order here does not meet this standard. The order is preliminary to a final determination of the lawfulness of the proposed TELPAK rates. It does not deny petitioners' right to lawful rates during the interim period before the lawfulness of the rates is finally determined, for that right is protected and preserved by the accounting and refund provisions of the order.

Petitioners' argument that the order is reviewable because it imposes upon them an interim burden of paying increased TELPAK rates rests upon the assertion that the imposition of this burden infringes a "right" which should be protected by immediate judicial review. See *NAMBO Br. p. 28; cf. Bethesda-Chevy Chase Broadcasters, Inc. v. FCC*, 128 U.S. App. D.C. 185, 186, 385 F.2d 967, 968 (1967). The error in this argument is apparent from decisions dealing with agency authority to suspend rates.

An order refusing to suspend a rate change for all or part of the period permitted by the statute has exactly the same consequence that petitioners assert makes the Commission's order here reviewable; it requires payment of the rates in the interval that elapses before a final determination of their lawfulness. Despite this conse-

⁴⁰ AP, unlike the other petitioners, did not file a petition for reconsideration with the Commission and its arguments here do not suggest that it is genuinely interested in, or would benefit from, a remand to the Commission for a fuller explanation of its reasons for believing that the tariff filing complied with the regulation.

quence it has uniformly been held, both in this and other jurisdictions, that such orders are not reviewable. *National Industrial Traffic League v. United States*, 287 F. Supp. 129 (D.D.C. 1968), *aff'd per curiam*, 393 U.S. 535; *Movers' & Warehousemen's Ass'n v. United States*, 227 F. Supp. 249 (D.D.C. 1964); *Luckenbach Steamship Co. v. United States*, 179 F. Supp. 605, 609 (D. Del. 1959), *vacated and dismissed as moot*, 364 U.S. 280; *Bison Steamship Corp. v. United States*, 182 F. Supp. 63, 66 (N.D. Ohio 1960). And see the authorities collected in *Long Island R.R. v. United States*, 193 F. Supp. 795, 797-98 (E.D.N.Y. 1961). See also, *Arrow Transportation Co. v. Southern Ry.*, 372 U.S. 658, 670.⁴¹

Petitioners attempt to evade the force of this unbroken line of authority by arguing that here they asked the Commission to reject the tariff and not merely to suspend it. But whether the requirements for judicial review are satisfied does not depend upon the label that petitioners attach to their prayers for relief any more than it depends "upon the label affixed to its action by the administrative agency." *Isbrandtsen Co. v. United States*, 93 U.S. App. D.C. 293, 297, 211 F.2d 51, 55 (1954), *cert. denied*, 347 U.S. 990. The courts have held that agency orders refusing to suspend rate changes are unreviewable even though a request for rejection was coupled with a request

⁴¹ Petitioners cite decisions in which review has been granted of a Commission decision to *vacate* a previously ordered suspension of a tariff, when the parties seeking review alleged that the Commission had not sufficiently explained the reasons underlying its action. See, e.g., *Amarillo-Borger Express, Inc. v. United States*, 138 F. Supp. 411 (N.D. Tex. 1956), *judgment vacated as moot*, 352 U.S. 1028; *Long Island R.R. v. United States*, 140 F. Supp. 823 (S.D.N.Y. 1956). These cases do not hold that the initial decision refusing to suspend rates is reviewable; instead they rest on the notion that if the Commission has made a determination that suspension is necessary it may not reverse that determination without an adequate explanation.

The *Amarillo-Borger* rule has been criticized, see, e.g., *Long Island R.R. v. United States*, 193 F. Supp. 795, 798 (E.D.N.Y. 1961) and a number of district courts have refused to follow it. *Naph-Sol Refining Co. v. United States*, 269 F. Supp. 530 (W.D. Mich. 1967); *Oscar Mayer & Co. v. United States*, 268 F. Supp. 977 (W.D. Wisc. 1967); *Freeport Sulphur Co. v. United States*, 199 F. Supp. 913 (S.D.N.Y. 1961).

for suspension. *National Industrial Traffic League v. United States*, *supra* at 131; *Bison Steamship Corp. v. United States*, *supra* at 64.⁴²

The reviewability of the Commission's order here is therefore not to be determined by the form of petitioners' prayer but rather by a realistic appraisal of the nature of the relief they sought and of the determination actually embodied in the order. As shown in Part I, *supra*, petitioners' requests for rejection or for suspension were based upon contentions that were directed essentially to an interim deferral of the effectiveness of the rate change, or in other words, to its timing.⁴³

The Commission's refusal to reject the tariff filing, like its refusal to suspend beyond the period permitted by the Act, had no final legal consequences apart from its effect on the timing of the rate increase. The Commission did not determine that the rates themselves were lawful but reserved that question, as it was required to do, for decision after a full hearing. No provision of the statute required the Commission to defer the effectiveness of the rate increase pending that determination, or gave petitioners any right to insist that it should do so. On the contrary, the statutory plan assumes that, although the Commission may suspend the rates, at the end of

⁴² The fact that an order suspending rates may be reviewable on a limited basis, see *Long Island R.R. v. United States*, 193 F. Supp. 795, 799-800 (E.D.N.Y. 1961), does not impair the unbroken line of authority holding that refusals to suspend are not reviewable, *Id.* at 797-98. There are differences between an order suspending a rate change and one refusing to do so that affect the question of reviewability. The statutory limitations on the Commission's power of suspension is one such difference. See p. 19 n.22 above. Another is that the carrier cannot be protected by an accounting and refund order.

⁴³ In realistic terms this is true even of the argument that the Commission should have rejected the tariff filing because of deficiencies in its form and because it did not contain enough supporting information to satisfy the Commission's regulations. Any deficiencies in form could have been cured overnight and it is reasonable to assume that AT&T would have promptly supplied any additional information that might reasonably have been required under the Commission's regulations. The argument was designed to achieve some additional delay in the effectiveness of the rate change and if accepted would have had no other significant consequence.

the statutory suspension period the rates will become effective subject to a subsequent determination of their lawfulness and subject to the carrier's obligation to refund if the rates are deemed to be unlawful. *Arrow Transportation Co. v. Southern Ry.*, 372 U.S. 658; *Willmut Gas & Oil Co. v. FPC*, 111 U.S. App. D.C. 49, 52-53, 294 F.2d 245, 248-49 (1961), *cert. denied*, 368 U.S. 975; *Isbrandtsen Co. v. United States*, 93 U.S. App. D.C. 293, 299, 211 F.2d 51, 57 (1954), *cert. denied*, 347 U.S. 990. Thus the Commission's refusal to reject, like its refusal to suspend, was not final but only interlocutory as to any substantive rights of petitioners under the Act.

The authorities cited by petitioners do not support a contrary conclusion. In *United Gas Co. v. Mobile Gas Corp.*, 350 U.S. 332, and the other cases cited at page 45 of the Aerospace brief, the courts reviewed agency orders refusing to reject rates that were alleged to be in violation of contracts fixing specific rates. The Natural Gas Act recognizes and sanctions such contracts. The orders involved in those cases, therefore, did not merely determine the timing of a proposed rate increase, but determined the substantive rights of the parties under their contracts and the statutory obligations resulting therefrom. The Commission's order here operated merely on the timing of the rate increase and made no determination of substantive rights under a rate-fixing contract or otherwise that was in any degree comparable to the determinations made in the cases arising under the Natural Gas Act.⁴⁴

⁴⁴ The petitioners also cite two cases in which rejection of the tariff necessarily involved a determination whether the carrier's certificate of convenience and necessity authorized the service covered by the tariff. See *Flying Tiger Line v. CAB*, 92 U.S. App. D.C. 260, 204 F.2d 404 (1953), and *W. J. Dillner Transfer Co. v. United States*, 214 F. Supp. 941 (W.D. Pa. 1963). No such substantive determination was made by the order here.

Trans-Pacific Freight Conference v. FMB, 112 U.S. App. D.C. 290, 302 F.2d 875 (1962), did not involve the suspension or rejection of rates, but rather an agency cease and desist order prohibiting a shipping conference from imposing fines on certain members pending a determination of legality.

Isbrandtsen Co. v. United States, 93 U.S. App. D.C. 293, 211 F.2d 51 (1954), *cert. denied*, 347 U.S. 990, arose under the Shipping Act and involved review of an order allowing rates to become effective in advance of a hearing on their lawfulness. The Court held that the Shipping Act required the agency to approve the rates before allowing them to become effective and that, in the absence of such approval, the rates involved were presumptively unlawful under the antitrust laws. 93 U.S. App. D.C. at 299, 211 F.2d at 57. In these circumstances, the court held that the Commission's order was determinative of substantive rights and reviewable. Here, in contrast, the Communications Act does not require prior agency approval of the rates; the Commission's order is not determinative of any substantive right but affects merely the timing of the rate increase; and the petitioners' right to be charged only lawful rates pending a determination of the lawfulness of the rate increase is protected by the accounting and refund provision of the Commission's order.⁴⁵

The petitioners' claims of irreparable injury do not advance their argument that the order is reviewable.⁴⁶ An order refusing to suspend a rate change may well result in a substantial financial burden or loss which is not and cannot be alleviated by accounting and refund provisions. This is true, for example, in the case of a rate decrease which threatens competitive injury to a competing carrier; a refund order by its very nature is

⁴⁵ *Isbrandtsen* falls within the category of "those exceptional cases where a court may consider the validity of what is in form an interlocutory administrative order but is in substance a final determination of individual rights or a deprivation of a substantive statutory right. Such exceptional authority is available only if the court is clearly convinced that review of final action would be completely unable to vindicate the statutory or substantive right." *Phillips Petro. Co. v. Brenner*, 127 U.S. App. D.C. 319, 323, 383 F.2d 514, 518 (1967), *cert. denied*, 389 U.S. 1042.

⁴⁶ These claims are discussed in detail in the memorandum submitted by AT&T in opposition to the petitioners' motion for interlocutory relief (pp. 66-73) and we respectfully refer the Court to that discussion.

not designed to compensate for or to protect against that kind of injury. Yet an order refusing to suspend is not reviewable merely because it threatens or inflicts that kind of injury. *Luckenbach Steamship Co. v. United States*, 179 F. Supp. 605 (D. Del. 1959), *vacated and dismissed as moot*, 364 U.S. 280. See also, *Arrow Transportation Co. v. Southern Ry.*, 372 U.S. 658. The petitioners' claims of irreparable injury do not change the fact that the order here is not reviewable because it does not finally determine substantive rights conferred by the Act but is merely an exercise of the agency's discretion with respect to the timing of a rate change.

CONCLUSION

For all of the reasons stated above the petitioners' prayers for relief against the Commission's order should be denied.

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BRIEF FOR INTERVENOR
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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 23833, 23836, 23839, 23841, 23842, 23843

THE ASSOCIATED PRESS, et al.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents,

AMERICAN TELEPHONE AND TELEGRAPH COMPANY and
THE WESTERN UNION TELEGRAPH COMPANY,

Intervenors.

ON PETITIONS TO REVIEW ORDERS
OF THE FEDERAL COMMUNICATIONS COMMISSION

United States Court of Appeals
for the District of Columbia Circuit

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Intervenors.

ON PETITIONS TO REVIEW ORDERS
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BRIEF FOR INTERVENOR,
THE WESTERN UNION TELEGRAPH COMPANY

ISSUES PRESENTED FOR REVIEW^{1/}

The Western Union Telegraph Company (Western Union), Intervenor in the above-captioned proceedings, believes the issues presented for review to be as follows:

1. Whether the Federal Communications Commission (Commission) properly found that there was no showing of sufficient circumstances

^{1/} These cases have previously been before the Court on motions for stay.

justifying rejection or indefinite suspension of the changes in TELPAK rates filed by American Telephone and Telegraph Company (Bell) on October 1, 1969.

2. Whether Bell's filing of these TELPAK rate changes violates the procedures agreed upon with regard to such rate filings.

3. Whether the Commission prejudged the lawfulness of these TELPAK rate changes by permitting corresponding reductions in Bell's rates for long-distance and wide-area telephone (WATS) service to become effective simultaneously with the instant TELPAK rate changes.^{2/}

STATEMENT OF THE CASE

The instant proceeding represents the latest phase in the long controversy dating back, inter alia, to Western Union's complaint in 1961 that the rates charged by American Telephone & Telegraph Company (Bell) for its so-called "TELPAK" service were discriminatorily low and hence subjected Western Union to competitive disadvantages and injury. Aspects of this controversy have already been before this Court in American Trucking Association, Inc. v. F.C.C., 126 U.S. App. D.C. 236, 377 F. 2d 121 (1966), cert. denied 386 U.S. 943 (1967). The facts here pertinent may be summarized as follows:

^{2/} Also presented although not briefed herein (see infra p.16, fn.12) are the questions (1) whether the orders here involved are interlocutory and hence not ripe for judicial review and (2) whether under Arrow Transportation Co. v. Southern Railway Co., 372 U.S. 658 (1963) this Court lacks jurisdiction to grant the relief sought by Petitioners herein.

The Original TELPAK Case

For many years prior to and subsequent to 1961, Bell and Western Union have been offering a service known as "private line service," under which the customer leased equipment and service enabling him to communicate between certain given points whenever he pleased, without going through the usual call-and-hook-up process. With the growth in the need for communication services, the Government and various large business enterprises and utilities were in a position to utilize many such private lines. See, American Trucking Association v. F.C.C., 126 U.S. App. D.C. at 240, 377 F. 2d at 125.

In 1960 the Commission issued its decision in the so-called Above 890 Mc ^{3/} case in which it made available the higher frequencies in the broadcast spectrum for private use and thereby made it possible for private industry to maintain their own microwave communication systems. Since transmission by private microwave was considered effective for various purposes for which private line services were used by large users, Bell filed its proposed TELPAK rates allegedly to meet the threat of competition created by the Above 890 Mc case. In Judge Prettyman's words (126 U.S. App. D.C. at 241, 377 F. 2d at 126), there was a "startling" and "wide disparity" between the low level of the TELPAK rates -- which originally were offered in four classifications (A, B, C, and D) based on the number of channels between a given pair of points -- and the higher private line rates for the same quantity

3/ Allocation of Microwave Frequencies Above 890 Mc, 27 F.C.C. 359 (1959), 29 F.C.C. 825 (1960).

of service and equipment.^{4/}

In response, inter alia, to the objections of Western Union, that these low TELPAK rates were discriminatorily low in violation of Section 202(a) of the Communications Act, the Commission instituted an investigation and found, following extensive hearings, that TELPAK and private line services were "like communication services" under Section 202(a); that there were no material cost savings attributable to TELPAK compared to private line services, and hence that the TELPAK rates were unlawfully discriminatory. Further, the Commission found that, while there was no competitive necessity shown for TELPAK A and B, there apparently was competitive necessity for TELPAK C and D, and that a further hearing was required on the question of whether the existing rates for these classifications were compensatory. See 37 F.C.C. 1111 (1964); 38 F.C.C. 370 (1964). Upon petitions for review filed by Bell and several TELPAK users with regard to the Commission's determination as to TELPAK A and B, this Court affirmed. American Trucking Association, Inc. v. F.C.C., supra.

^{4/} Judge Prettyman illustrated this disparity by comparing the following examples of monthly rates (See 126 U.S. App. D.C. at 241, 377 F. 2d at 126):

	Individual Private Lines	Telpak
TELPAC A (12 Voice Grade Channels)	\$3,780	\$1,860
TELPAC B (24 Voice Grade Channels)	7,560	2,720
TELPAC C (60 Voice Grade Channels)	18,900	4,300
TELPAC D (240 Voice Grade Channels)	75,600	11,700

Consolidation of TELPAK With
General Rate Investigation

Meanwhile, in October, 1965, while the original TELPAK case was still sub judice, the Commission instituted in Docket 16258 a general investigation into the reasonableness of (1) Bell's overall return and (2) its rates for all of its interstate services other than TWX and TELPAK as to which separate proceedings were then pending. 2 F.C.C. 2d 871, 874 (1965). By order issued in December 1965, the Commission divided this investigation into two phases with Phase 1 directed to (a) Bell's total revenue requirements applicable to its interstate and foreign communications services generally and (b) the development of rate-making principles for the distribution of these revenue requirements among Bell's principal service classifications. 2 F.C.C. 2d 142 (1965).

Thereafter, following the decision by the Court in the original TELPAK case, the Commission in November 1966, directed that TELPAK A and B be cancelled "within 60 days from the date of order * * * effective on 30 days' notice" and consolidated the issues as to whether TELPAK C and D rates were compensatory into the Bell general rate investigation (App. 7, 9; 7 F.C.C. 2d 30, 31). Subsequently, however, when Bell and several TELPAK users urged that the users needed more time to restructure their communication services, the Commission postponed the cancellation of TELPAK A and B until May 1, 1967, although it also indicated agreement "generally with Western Union that after nearly 6 years and much litigation the unlawful discrimination should be eliminated without undue delay. (App. 16, 21; 6 F.C.C. 2d 177, 181).

The 1968 TELPAK Rate Increase

Pursuant to the direction of the Commission's Telephone Committee in the Bell general rate investigation, Bell, in January 1967, distributed proposed new rates for TELPAK C and D, suggesting, however, that these new rates not be made effective before the latter part of 1967 in order to allow TELPAK users sufficient time to make necessary rearrangments (App. 25). The proposed rates thus distributed by Bell affected the TELPAK C and D rates as follows (App. 32):

	<u>Rates Then In Effect</u>	<u>Proposed New Rates</u>
TELPAK C (Per Airline Mile)	\$25.00	\$30.00
TELPAK D (Per Airline Mile)	45.00	85.00
Service Terminals, Voice and Teletypewriter		
First Station in Exchange	15.00	35.00
Subsequent Stations	5.00	15.00
Telegraph/Telephone Channel Equivalency	12 to 1	2 to 1

By filing made February 1, 1968, Bell proposed to make the above rate changes effective as of April 1, 1968 (App. 83-88). A number of TELPAK users, including some of the instant Petitioners, moved to reject or suspend the proposed rate changes for a period beyond the 90 days provided in Section 204 of the Communications Act, claiming, inter alia, that it was too much to force them to absorb a rate increase of the magnitude proposed all at once. (See App. 89, n.) Acceding to these urgings, Bell, on March 13, 1968, applied for leave to withdraw the proposed tariff changes (App. 134-135), and on March 25, 1968, filed the following lower rates for TELPAK C and D, to be

effective June 1, 1968 (App. 135):

TELPAC C (Per Airline Mile)	\$28.00
TELPAC D (Per Airline Mile)	60.00
Service Terminals, Voice and Teletypewriter	
First Station in Exchange	25.00
Subsequent Stations	10.00
Telegraph/Telephone Channel Equivalency	6 to 1

While it thus reduced the proposed increase in these rates approximately by half, Bell nevertheless made it clear that it regarded the higher rate revisions as "fully justified by relevant cost and market considerations" (App. 134), and emphasized further that the reductions in the tariff increases were to be only temporary in nature and would be replaced by higher rates in the near future (App. 134).

Although the TELPAK users still objected and sought rejection or indefinite suspension of even this rate filing, the Commission, by Order FCC 68-388, dated April 12, 1968 (App. 170-172), set these rate changes for hearing in a separate Docket 18128 and suspended their effectiveness for the full 90-day statutory period until September 1, 1968. The Commission there noted that it was acting at an early date to suspend the new TELPAK rates "in order to afford all interested parties the earliest practicable notice thereof * * * so that TELPAK users may be able to adjust the new effective date of these tariff schedules." (App. 171.) In addition, the Commission warned (App. 172):

"* * * it should be clearly understood by the TELPAK users, that in the event a complete hearing record indicates that increases in the TELPAK rates are justified

or required, or that the TELPAK classifications should be eliminated, any increases occasioned thereby will become effective without delay. The users should henceforth govern themselves accordingly, and their communications budgets should be prepared with this contingency in mind. In this connection, users have been on notice since 1961 that TELPAK rates presented substantial questions of lawfulness requiring formal investigation and that significant increases in these rates could result."

While various TELPAK users filed pleadings urging the Commission to reconsider and to grant extraordinary relief to prevent even these interim rates from becoming effective, the Commission declined to take such action in an order dated August 28, 1968 (App. 205-209, 14 F.C.C. 2d 564). However, by order dated July 10, 1968 (App. 176, 182, 13 F.C.C. 2d 853), the Commission had imposed an accounting order under Section 204 of the Federal Communications Act requiring Bell to keep appropriate records as to all amounts received by it under these increased TELPAK rates and reserving the right to require appropriate refunds. By this order the Commission had also directed the temporary deferral of the hearings on these TELPAK rate changes pending determination of the appropriate rate-making principles in Phase 1-B of Docket 16258^{6/} and the resolution of the TELPAK sharing issue involved in Docket 17457,^{7/} both of which proceedings the Commission also ordered should be expedited.

^{6/} The Commission had already issued orders relating to Bell's total revenue requirements involved in Phase 1-A of Docket 16258 on July 5, 1967 and September 13, 1967, 9 F.C.C. 2d 30, 9 F.C.C. 2d 960.

^{7/} Docket 17457 involves the question whether the provisions of the TELPAK tariff permitting certain limited classifications of customers jointly to use TELPAK as furnished either by Bell alone or by Bell and Western Union jointly, with the charges therefor being computed as if furnished entirely to a single customer, violated the prohibition in Section 202(a) of the Communications Act against unlawful discrimination.

The Statement of Rate-Making Principles

Extensive hearings were being held in the meantime in Phase 1-B of Docket 16258, in the course of which the parties had held a series of off-the-record conferences, which culminated in a so-called "Statement of Rate-Making Principles." This Statement included a stipulation among the parties and the Commission Staff, both as to substance and procedure, with regard to the principles governing determination of specific rate-making issues such as the TELPAK rates in Docket 18128. (See Appendix A to order dated July 29, 1969, 18 F.C.C. 2d 761, 765). By order dated July 29, 1969, 18 F.C.C. 2d 761, noting (but not adopting or approving) the stipulation, the Commission pointed to Bell's agreement "that implementing studies called for by the statement, and any related rate adjustments based thereon, can be filed by October 1, 1969" (App. 217, 18 F.C.C. 2d at 763). Further, the Commission commented (App. 217, Id. at 764):

"* * *, we believe that the procedures will enable us to reach these rate issues with greater dispatch and effectiveness than if further extended hearings were held in docket 16258. Accordingly, it is our judgment that the proposed procedures will provide a better and more timely method of reaching a final conclusion on these important matters and will best conduce to the proper exercise of our statutory authority and promote the ends of justice."

The Instant TELPAK Rate Changes

In accordance with the undertaking thus recognized by the Commission, Bell completed its cost and market studies, and on the basis thereof filed, on October 1, 1969, new rate changes proposing to increase its TELPAK C and D rates to the levels which it had proposed in January, 1967 (App. 280-354).

As in the past, a number of TELPAK users, including the instant Petitioners, moved the Commission to reject or suspend indefinitely these rates. As in the past, they urged, inter alia, that such extraordinary relief was needed because suspension of, and investigation into, these tariffs even though accompanied by an accounting order exposed them to irreparable injury. In addition, they claimed that the filing of these rate changes violated the procedure agreed upon in the Statement of Rate-Making Principles (See App. 355-557).

In its Order FCC 69-1196 released November 6, 1969 here under review (App. 558-571, 20 F.C.C. 2d 383), the Commission ruled (1) that, apart from any question as to the Commission's authority to grant such relief, Petitioners have failed to show "sufficient circumstances that would require the extraordinary remedies they seek" (App. 562, Id. at 386), and that (2) the filing of the instant TELPAK rate changes did not violate the agreed upon procedure set out in the Statement of Rate-Making Principles (App. 561, Id. at 386). However, notwithstanding the objections of Bell and Western Union and the long history of discriminatory, low TELPAK rates and resulting adverse impact upon Western Union, the Commission provided that the rate changes should be suspended for the full 90-day statutory period, i.e., until February 1, 1970, thereafter to be effective, subject to an accounting order (App. 564, Id. at 387, 388). Further noting a recommended decision which had been issued in the TELPAK sharing

proceeding in Docket 17457 and the Statement of Rate-Making Principles which had been agreed upon by the parties in Phase 1-B of Docket 16258, the Commission authorized the Examiner in the instant proceeding to schedule hearings with regard to all the TELPAK rate changes "at such time as he may deem appropriate." (App. 563, Id. at 387-388).^{8/}

Commissioners Cox and Johnson filed separate opinions, both urging that the instant rate changes should not have been suspended for the full statutory period. In the words of Commissioner Johnson (App. 567, Id. at 390):

"The Commission is going to suspend the new TELPAK rates for the maximum period allowed by law -- 90 days. For the purposes of a hearing and accounting order, a one-day suspension would serve as well. Large users of communications services will thus have the effect of the rate increases postponed -- despite the fact that TELPAK users have been on notice for eight years that the TELPAK rates may be non-compensatory and for months that rate increases were coming." (Emphasis in original).^{9/}

The Offsetting Reductions in
Long-Distance and WATS Rates

Almost simultaneously with the release of Order FCC 69-1196 here under review, the Commission issued its Public Notice FCC 69-1210, in which it noted an undertaking by Bell to offset the revenue increases

^{8/} By Order FCC 69-1345, dated December 16, 1969, the Commission similarly suspended until February 1, 1970, the TELPAK rate changes filed by Western Union which, for competitive reasons, were identical to those of Bell. Because of the close association between these rate filings the Commission also consolidated for hearing these Western Union rate filings with those of Bell.

^{9/} Emphasis supplied throughout unless otherwise indicated.

expected to result from the higher rates proposed inter alia for TELPAK by reducing its rates for long-distance and WATS service by \$87 million per year, effective when the higher TELPAK rates became effective (App. 572).^{10/} In addition to the objections which they had made earlier, certain TELPAK users contended in their petitions for reconsideration of Order FCC 69-1196, that the above Notice indicated Commission prejudgment of the instant TELPAK rate changes.

In rejecting this contention in its order dated January 19, 1970 (App. 724-33, 21 F.C.C. 2d at 1), the Commission pointed out that, in accordance with Bell's own express recognition, the TELPAK rate changes "must withstand the statutory tests of sections 201(b) and 202(a) of the Communications Act" and that Bell "has no resort to any argument that such rates were part of an offset arrangement [omitted]." (App. 726-727; 21 F.C.C. 2d at 3). The Commission also again declined to reject or suspend indefinitely the instant TELPAK rate changes, noting that not only had the TELPAK users long been aware that Bell considered the instant TELPAK rates to be justified, but the Commission itself had advised these users "to prepare their communications budgets for the contingency of TELPAK rate increases or even the elimination of the service." (App. 727-728, 21 F.C.C. 2d at 4).

^{10/} This Notice also announced that as a part of the Commission's "continuing surveillance" over Bell's rates, Bell had agreed to reduce its long distance and WATS rates by an additional \$150 million per year (App. 572).

ARGUMENT

These six consolidated petitions for review ^{11/} have been filed by various TELPAK users and groups of users seeking to have set aside the Commission order dated November 6, 1969, in which the TELPAK rate changes filed by Bell on October 1, 1969, became effective subject to accounting, as of February 1, 1970, after suspension for the full 90-day period provided in Section 204 of the Communications Act.

Petitioners advance a variety of contentions -- comparable to those advanced in support of their rejected motions for stay -- in support of their position here that the Commission erred in failing to reject or suspend indefinitely those rate changes. In so urging, Petitioners would ignore the history of the long controversy over Bell's TELPAK rates; they would brush aside the repeated warnings of both Bell and the Commission to prepare for the filing of rates comparable to those here involved; they would perpetuate the subsidy they have enjoyed in these discriminatorily low rates at the expense particularly of Bell's long-distance customers; and they would continue the competitive disadvantage and enhance the revenue losses to which Western Union has been subjected. As shown below, the contentions

^{11/} Petitioner in No. 23841, American Trucking Association, Inc., has not filed a brief. Petitioners in No. 23839, Air Transport Association of America, et al., and Petitioner in No. 23842, Aeronautical Radio, Inc., have joined in a single initial brief.

which Petitioners advance in support of such a result have no basis
in fact or law.^{12/}

I.

THE COMMISSION PROPERLY DECLINED
TO REJECT, OR POSTPONE INDEFINITELY
THE INSTANT TELPAK RATE CHANGES

In urging that the Commission erred in declining to reject or suspend indefinitely the instant TELPAK rate changes, Petitioners claim on the basis of the decision of the Supreme Court in Permian Basin Area Rate Cases, 390 U.S. 747 (1968), the other recent decisions under the Natural Gas Act -- (1) that the Communications Commission has authority under the Communications Act to impose moratoria upon rate filings by common carriers subject to its jurisdiction, and (2) that on the facts in the present proceeding, the Commission should properly have exercised such authority and, accordingly, erred in failing to reject or postpone indefinitely the TELPAK rate changes here involved.

As shown below, the Commission properly held that even assuming it had the power, the circumstances here involved do not make out a case for rejecting or suspending indefinitely the instant TELPAK rate changes as urged by Petitioners. This is particularly so since, as

^{12/} These appeals must also fail, we submit, for the further reasons: (1) that the orders here involved are interlocutory and hence not ripe for judicial review, and (2) that under Arrow Transportation Co. v. Southern Railway Co., 372 U.S. 658 (1963), this Court lacks jurisdiction to grant the relief in effect sought herein by Petitioners. Since Bell's brief deals with these matters extensively, we do not undertake any discussion thereof other than to state that we agree with Bell's conclusion.

also shown below, the Permian and other natural gas cases relied on by Petitioners involved a special extraordinary situation peculiar to producer regulation under the Natural Gas Act and hence these cases are far different and distinguishable from the present case. The instant case thus does not present an occasion for exercising the authority asserted by Petitioners, even if it be assumed arguendo that the Commission has such authority. Accordingly, the Commission's decision not to reject or suspend indefinitely the instant TELPAK rate changes was plainly correct without the need of "deciding at this time the extent of our authority to grant the kind of relief petitioners request" (App. 562; 20 F.C.C. 2d at 386).

A. The Commission Properly Found That There Was No Showing of Sufficient Circumstances Justifying the Extraordinary Relief Requested by Petitioners

As indicated above, a major facet of Petitioners' claim that the Commission erred in failing to reject or suspend indefinitely the TELPAK rate changes here involved is their contention that the Commission's Order FCC 69-1196 under which Bell's TELPAK rate changes here involved became effective as of February 1, 1970, exposes them to substantial irreparable injury, even though the order also imposes a requirement of an accounting as authorized by Section 204 of the ^{13/} Communications Act. There are, we submit, a number of independently dispositive answers to this contention.

^{13/} See Brief in No. 23833 (AP) pp. 6-8, 12-13, 20-21; Brief in No. 23836 (Aerospace) p. 13 et seq.; Brief in Nos. 23839, 23842 (Airline) pp. 11-12, 19-20, 38-40; Brief in Nos. 23843 (NAMBO) pp. 7-8, 11-12, 20-22.

1. Petitioners' Alleged Irreparable Injuries
Result From Their Own Refusal to Heed the
Numerous Warnings Given Them

In addition to the fact that the increase in cost of TELPAK to each of the TELPAK users would obviously be only a very small part of its total cost of doing business since a list of TELPAK users typically reads as a Who's Who in American industry, most, if not all, of the injuries which TELPAK users allegedly will suffer as a result of the Order FCC 69-1196 will be incurred because of their persistent refusal to make appropriate arrangements in light of the several warnings given them that the TELPAK rates might be increased, or the service even terminated.

To begin, the level of the rates for TELPAK C and D here involved have been suspect since 1961, or at the very least, since 1964, when the Commission held not only that TELPAK and private line services were "like communications services," but that while there apparently was competitive necessity justifying TELPAK C and D, there was no showing that the low rates for TELPAK C and D were ^{14/}compensatory (see 37 F.C.C. 1111, 38 F.C.C. 370, supra p.4). In this regard it is significant that the rates for TELPAK, even as increased by the instant filing, are still substantially below those for "like" private line services. For example, whereas the new TELPAK

^{14/} As was there noted by the Commission, the apparent competitive necessity for TELPAK C and D stemmed from the fact that it might be practical for a customer to construct his own microwave system if he needed the number of channels encompassed within these classifications.

D rate filed by Bell is \$85.00 per mile for 240 voice circuits, or about 35¢ per mile for each voice circuit, the rate per mile for a private line voice circuit begins at \$3.00 per mile for the first 25 miles and decreases by mileage steps to 75¢ per mile for the portion of the mileage in excess of 500 miles. See, e.g., AT&T FCC Tariff No. 260, p. 55.1, Second Revised page (July 15, 1969).

In addition to the implicit warning inherent in this disparity in the TELPAK and private line rates, Bell has repeatedly given TELPAK users explicit notice of its intention to increase its rates for TELPAK approximately to the level provided in the filing here involved. Thus, in response to the direction of the Commission's Telephone Committee in Docket 16258 (FCC 66 M-1582) requiring the submission of revised cost data and any new proposed rates for TELPAK C and D, Bell, as early as January 1967 -- more than 3 years ago -- distributed a proposal to revise TELPAK C and D rates to the level set out in the rate filing here involved (App. 22-38; supra p. 6). Bell then proposed that these rate changes "not become effective until the latter part of 1967" in recognition of

"[t]he difficulties that present TELPAK customers will encounter in evaluating their communications requirements and restructuring their communications networks, in light of the rate increases proposed in this statement and of the elimination of TELPAK A and B. These customers should be afforded adequate time to make the necessary rearrangements." (App. 24-25).

Thereafter, by filing made in February 1968, Bell proposed to change effective April 1, 1968, the rates for TELPAK C and D to the levels earlier indicated by it. And while in March 1968 Bell yielded

to the urgings of the TELPAK users by withdrawing this rate proposal in favor of rate changes approximately half as large (App. 134), Bell went out of its way to warn that the reduced rate changes were only temporary in nature and that they would be replaced by the higher rates in the near future (App. 134):

"We believe that in any Commission investigation it will be demonstrated that TELPAK rates should be established at substantially the level of those which were filed to become effective April 1, 1968. The proposed new revisions will constitute an intermediate step in achieving that level." (See also supra p. 7).

The Commission has likewise put the TELPAK users on notice of possible increases in TELPAK rates. Thus, in its Order FCC 68-388, issued April 12, 1968, suspending the effectiveness of the reduced 1968 TELPAK rate changes until September 1, 1968, the Commission explicitly admonished (App. 172; see also supra, p. 7).

"* * * it should clearly be understood by the TELPAK users that, in the event a complete hearing record indicates that increases in the level of TELPAK rates are justified or required, or that the TELPAK classification should be eliminated, any increases occasioned thereby will become effective without delay. The users should henceforth govern themselves accordingly, and their communications budgets should be prepared with this contingency in mind. In this connection, users have been on notice since 1961 that TELPAK rates presented substantial questions of lawfulness requiring formal investigation and that significant increases in these rates could result." 15/

And in its order noting the Statement of Rate-Making Principles (18 F.C.C. 2d at 761, supra p. 9), the Commission expressly adverted to Bell's agreement "that implementing studies called for by the Statement, and related rate adjustments based thereon, can be filed by

15/ The fallacy in the claim of Petitioners Airline and NAMBO, based on the above Commission language, of an implied moratorium on further TELPAK rate changes is discussed, infra pp. 46-48.

October 1, 1969." (App. 217, 18 F.C.C. 2d at 763). As noted supra p.9, the instant TELPAK rate revisions were in fact filed on October 1, 1969, and while Bell proposed that they be effective November 1, 1969, the Commission Order FCC 69-1196 here under review suspended their operation until February 1, 1970 (App. 564; 20 F.C.C. 2d at 388).

In these circumstances, it is readily apparent, as the Commission pointed out in its order denying rehearing herein (App. 727-8; 21 F.C.C. 2d at 4), that not only has Bell itself given TELPAK users "long standing notice of [its] intention to raise TELPAK rates," but the Commission had long ago advised them that "in light of the constant litigation surrounding the TELPAK tariff [they] should prepare their communications budgets for the contingency of TELPAK rate increases or even the elimination of the service. [footnote ^{16/}omitted]."

Plainly, therefore, TELPAK users, including Petitioners herein, have been given ample notice and opportunity to plan for and in fact to make adjustments in their budgets and communications services which might be called for as a result of changes in TELPAK rates such as those filed here by Bell and Western Union. Accordingly, Petitioners' present arguments (which for the most part are merely reiterations

^{16/} Aerospace's contention (Br. pp. 22-23) that the Commission did not in fact give any such advice is based on a bob-tailed version of the Commission's order of April 12, 1968; but even if Aerospace were correct in this regard, there is no disputing the repeated warnings given by Bell.

of their arguments made in support of their rejected motions for stay herein(as well as each time Bell proposed revisions in TELPAK rates) strongly suggest that they have chosen not to heed these warnings and, instead, to continue their efforts to retain the benefits of the subsidy inherent in the discriminatory, low TELPAK C and D rates for as long as possible.

In this regard, it is appropriate to recall the words of Commissioner Cox in the original TELPAK case in 1964. In objecting to the procedure adopted by the Commission to implement its finding that while the TELPAK rates were discriminatorily low, the rates for TELPAK C and D might be justified by competitive necessity, Commissioner Cox there admonished (37 F.C.C. 1111, 1120 (1964)):

"I discern a very disturbing pattern in connection with all the bulk rate tariffs which have been filed in recent years. AT&T offers new services which are very attractive to large users of communications. Protests are filed by competitors who claim that the tariffs are discriminatory and will result in damage to their business. The Commission suspends the tariffs, but they go into effect at the end of the statutory 90-day period. Customers are attracted and come to rely on these services. If and when, months later, we find the tariffs to be unlawful, we are besieged by users complaining that it would be unfair to withdraw the benefits they have come to value. * * * I think we can reverse this trend only by expediting our proceedings in such cases as much as possible, and then effectuating our conclusion at once. Then perhaps the users of telephone services will learn that they should not rely upon offerings which we have decided should be suspended. All the intervenors proceeded in the face of clear warnings that the TELPAK tariffs were going to be questioned. I do not think this justifies the claims they now make, and which the majority recognizes."

2. Petitioners' Claims Ignore Counteracting Benefits

Petitioners' arguments that the Commission order exposes them to irreparable injury necessarily assume that the TELPAK rate increases here involved will ultimately be found to be unreasonably high. Aerospace (Br. p. 25 and fn. 11) purports to find support for such an assumption in the cost studies submitted by Bell in connection with the instant rate filing. However, not only are these rates still substantially below those of the "like" private line services (as is pointed out supra p. 4), but, as the Commission's order denying rehearing points out with regard to the comparable argument made by another TELPAK user, there has been no determination as yet as to the proper method of pricing TELPAK or any other service offered by Bell (App. 728; 21 F.C.C. 2d at 5). Indeed, the Statement of Rate-Making Principles, noted by the Commission in its order dated July 29, 1969 (18 F.C.C. 2d 761), highlights the absence of agreement among the parties as to the proper principles for allocating Bell's costs among its various service offerings and the reservation by each participant therein of its position in this regard.

Consequently, until there is a resolution of these matters and of related problems of cost allocation among Bell's several service offerings, it cannot be reasonably assumed that the instant TELPAK rates will in fact be found to be unreasonably high. To the contrary, since it is at least equally reasonable to assume that the instant TELPAK rates will be found to be reasonable or, indeed, even too low,

the impact of such eventualities upon the various interests involved must also be taken into account.

Thus, should the instant TELPAK rate increases ultimately be held to be lawful, not only would Petitioners' claim of irreparable injury obviously disappear, but Petitioners would have received substantial affirmative benefits which they will be able to retain. There is no way to recoup from Petitioners the benefits of having paid lower rates during (1) the 3-month period from November 1, 1969, to February 1, 1970, when Bell's instant TELPAK rate changes were suspended by Commission order; (2) the 19-month period from April 1, 1968 (the effective date which Bell proposed for these rates when they were part of its February 1968 rate filing) to November 1, 1969, and (3) the nearly 7-year period from 1961, when the even lower TELPAK C and D rates first went into effect, until April 1, 1968.

Indeed, even should the instant TELPAK rate increase be found to be lawful only in part, then any claim of irreparable injury which Petitioners may seek to make as a result of having been required to pay the entire increase, cannot properly be evaluated without taking into account the benefits which Petitioners received as a result of having to pay lower rates during the nearly eight-year period since 1961, as well as any refunds which they may receive under the accounting order.^{17/}

^{17/} Aerospace's characterization of the above argument as "specious" (Br. p. 23, fn. 9) apparently misunderstands its purpose. The fact that the TELPAK users have been benefiting from low rates since 1961, obviously is highly relevant as a counterbalance to Petitioners' claims of irreparable injury. The argument is not directed, as Aerospace would have it, to its claim (dealt with in subpart B, *infra*, pp. 28-35) that it has been denied the expedited hearing to which it is allegedly entitled under the Communications Act.

3. Under the Rate-Making Scheme Provided In The Communications Act, Customers As Well as The Carrier Are Intended to Bear a Share of the Potential Adverse Effects

Still another answer to Petitioners' contention is that the irreparable injury which they allegedly will suffer as a result of the Commission's order here under review falls squarely within the allocation of such burdens between the customers and the carriers provided by Congress in the rate-making scheme included in the Communications Act. In other words, the risk of such injury is an inherent aspect of the rate-making process and hence, the injury, if any there should result, comes within the characterization of damnum absque injuria.

When a regulated company files rate changes with the regulatory agency and a question arises as to the lawfulness of these changes, there is a problem as to what rate should be charged and paid during the period between the company's filing of the rate changes and the agency's determination of their lawfulness. If the new rates turn out to be lawful, then, in order to keep the company whole, it should have been allowed to charge that rate since the date of its initial filing. If, however, the lawful rate turns out to be the old rate or some rate between the old and the new, then that is all that the company should be permitted to charge, and its customers required to pay, during the period between the filing and Commission determination.

Since provision must be made for some rate during the interim until the proper rate level has been ascertained at the conclusion of

the agency proceeding, Congress had the problem of what to do. If the company were denied the right to charge the new rate during that period, then it might well suffer severe hardships. On the other hand, if it were permitted to charge the new rate while its lawfulness was being determined, then its customers might have cause to complain.

The answer adopted by Congress consisted of a compromise which took several years to evolve. See Arrow Transportation Co. v. Southern Railway Co., 372 U.S. 658, 662-666 (1963) affirming 308 F. 2d 181 (5th Cir. 1962). This compromise, which was first included in the Interstate Commerce Act, and subsequently adapted for the Federal Communications Act and other regulatory statutes, provided for the suspension of the new rates for a period of time and then for the new rates to become effective subject to possible refund to the customers of the excess over the reasonable rates as ultimately determined by the agency.

The Courts have recognized (1) that the compromise thus adopted by Congress left some or all of the parties exposed to possible injuries, and (2) that no relief was available therefrom other than through action by Congress. Thus, in Arrow Transportation, supra, the Fifth Circuit stated (308 F. 2d at 184):

"Some irreparable injury appears unavoidable in the process of establishing new rates. If the new rates are ultimately determined to be just, reasonable, and lawful, the carriers and that portion of the public which would benefit from the change in rates have nonetheless suffered irreparable injury during the period of suspension. If the

^{18/} Such as Section 205(e) of the Federal Power Act, 16 U.S.C. 824d(e) and Section 4(e) of the Natural Gas Act, 15 U.S.C. 717c(e).

period of suspension has expired and the new rate schedule goes into effect, but is subsequently determined to be unlawful, then competing carriers and that portion of the public which would suffer because of the change in rates has been injured during the period when the rates were not suspended and in many cases that injury is irreparable." 18a/

Yet, despite this express recognition of exposure of the customers and the carriers to potential irreparable injury, the Fifth Circuit concluded (Id. at 186):

"Essentially the Court is asked to declare as to the present case that the seven-month period of suspension provided in the statute is inadequate. If that can be done in this case, there is practically no end to the number of instances in which the courts will be called on to set aside the mandate of the statute. Congress, in its wisdom, has fixed seven months [in the Interstate Commerce Act, 49 U.S.C. 15(7)] as the maximum period of suspension. It seems clear to us that if the courts extend that period, they are in effect amending the statute and that is a matter beyond their power."

Also relevant in this connection is Hope Natural Gas Co. v. F.P.C., 196 F. 2d 803 (4th Cir. 1952). In that case, the company claimed that since the Commission had found its new rates to be lawful, it should be permitted to collect that rate for the period during which it had been suspended pursuant to the Commission order issued under Section 4(e) of the Natural Gas Act (15 U.S.C. 717c(e)). In upholding the Commission's refusal to permit Hope to collect the higher rates for gas delivered during the suspension period, the Fourth Circuit stated in pertinent part:

"The settled construction by the Interstate Commerce Commission of the suspension provision of the Interstate Commerce Act is that, when the Commission suspends a rate,

18a/ See, also, the Finding 12 of the District Court in that case reproduced in the opinion of the Court of Appeals (308 F. 2d at 183).

the old rate is continued in effect pending the investigation and subsequent orders allowing increased rates are given only prospective operation." (196 F. 2d at 807).

* * * * *

"It is argued that since the rates allowed by the Commission were found to be reasonable with reference to a test year which ended just before the beginning of the suspension period, there is as much reason in making the rates applicable during the suspension period as during the following period when the rates which had been suspended were in effect. This, however, was a matter for Congress and not for the Commission or the courts." (196 F. 2d at 808).

4. The Tennessee Case Is Distinguishable
And Does Not Advance Petitioners'
Position

Petitioners seek to buttress their position by relying upon F.P.C. v. Tennessee Gas Transmission Co., 371 U.S. 145 (1962) and F.P.C. v. Hunt, 376 U.S. 515 (1964). See Aerospace Br. pp. 20-21; Airline Br. p. 40; NAMBO Br. pp. 20-21. However, in neither case did the Power Commission take the action here urged by Petitioners; in Tennessee, the Power Commission permitted the rate under attack to go into effect subject to refund after the period of suspension, as the Communications Commission did here; and in Hunt, the Power Commission included, as part of a temporary authorization, a proscription against filing rate increases during the period that authorization was in effect.

Moreover, both of these cases arose under the Natural Gas Act, where the Commission's authority to require refunds extends only

as far as the distributing companies purchasing gas from the companies subject to Commission regulation under the Act. However, when these distributing companies pay increased rates even though subject to refund, they typically pass on the higher rates to the millions of ultimate consumers purchasing gas from them.

As a result, the Supreme Court in Tennessee and Hunt characterized the refund procedure as inadequate because in many instances those who in effect paid the higher rates did not receive the refund of excess monies paid by them (371 U.S. at 154-155):

"* * * True, the exaction would have been subject to refund, but experience has shown this to be somewhat illusory in view of the trickling down process necessary to be followed, the incidental cost of which is often borne by the consumer, and in view of the transient nature of our society which often prevents refunds from reaching those to whom they are due (fn. omitted)."

In the instant case, there is no problem of "trickling down" or of the refunds not "reaching those to whom they are due." To the contrary, all refunds would be paid directly to the relatively small handful of TELPAK users, including Petitioners to whom such refunds would be due by virtue of having paid the increased rates. Cf. Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531 (1918). Thus, the irreparable injury here claimed by Petitioners is entirely different from what the Supreme Court had in mind in Tennessee. The uncompensated injuries here claimed by Petitioners relate to what at most would be consequential or indirect damages, i.e., damages other than payment of the excessive rates themselves (see e.g.,

Aerospace Br. pp. 20-22; NAMBO Br. pp. 11-12, 20-22).

Moreover, the Court's reference to the inadequacy of the refund procedure was part of one of several grounds which it invoked in support of the construction of another statutory provision adopted by it. Thus, the Court reasoned that adoption of another construction of the statutory provision there in issue would frustrate

"* * * the purposes of the Act 'to protect consumers against exploitation at the hands of natural gas companies * * *' [citation omitted]. Faced with the finding that the rate of return was excessive, the Commission acted properly within its statutory power in issuing the interim order of reduction and refund, since the purpose of the Act is 'to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges * * *' [citation omitted]." (372 U.S. at 154).

Accordingly, in neither case was the inadequacy of the refund or accounting procedure accepted as the sole reason for rejecting a specific rate increase, as Petitioners would have this Court do in the instant case. Nor could such a result be proper or in accord with the statutory scheme, since the refund or accounting procedure, whatever may be its inadequacies, is an integral part of the rate-making procedure knowingly adopted by Congress.

B. Petitioners Have Not Been Denied a Prompt Hearing With respect to the Instant TELPAK Rate Changes

As another argument in support of its claim that the Commission's order should be set aside, Petitioner Aerospace (Br., pp. 12-23) contends that the Commission has failed "to provide the expedited hearing on the rate increase required by Section 204."

Not only is this contention wholly contrived and devoid of merit, but assuming arguendo that it were valid, the proper relief, even in appropriate circumstances -- which are not present here -- is at most a direction to the Commission to expedite its proceedings. See, e.g., Mesa Microwave Co., Inc. v. F.C.C., 105 U.S. App. D.C. 1, 262 F. 2d 723, (1958); Harvey Radio Laboratories Inc. v. United States, 110 U.S. App. D.C. 81, 289, F. 2d 458 (1961).^{19/}

Granting the relief of rejecting the rate filing would certainly not have the result of expediting the hearing. To the contrary, it might very well serve to put off the day when the Commission finally determines a lawful rate for Bell's TELPAK offering. This would be particularly so if the construction of the Statement of Rate Making Principles urged by Aerospace and Airline were to be adopted. See infra, pp. 41-53.

Apart from the obvious inconsistency of such a result with the ostensible purport of Aerospace's arguments, such a result would continue the burden upon Western Union which has been waiting nearly a decade for the elimination of the unfair disadvantage to which it has been subjected by Bell's discriminatorily low TELPAK rates. It was in 1961 that Western Union first complained to the Commission about Bell's TELPAK rates and although the Commission in its decision in the original TELPAK case in 1964 in effect agreed with Western Union, Western Union is still waiting for a determination by the Commission as to the proper level for TELPAK C and D.

^{19/} The Court in Mesa characterized such relief as "an extraordinary remedy * * * to be used only upon a clear showing of necessity." 105 U.S. App. D.C. at 2, 262 F. 2d at 724.

1. Aerospace's Complaints of Delay are
Addressed to 1968 TELPAK Rate Changes

Contrary to the impression which Aerospace apparently is seeking to create, most of its arguments in this connection relate to the earlier (i.e. 1968) TELPAK rate changes. (See Aerospace Br. pp. 15-17). Thus, the Commission Order FCC 68-711 dated July 10, 1968 (App. 176, 13 F.C.C. 2d 893), in which the Commission directed the deferral of the proceedings in Docket 18128 until (1) the determination of the rate-making principles in Phase 1-B of Docket 16258, and (2) the resolution of the TELPAK sharing issue in Docket 17457, was concerned with the 1968 TELPAK rate changes. See also, supra, p.8. And while Aerospace now seeks to complain about the delay stemming from that deferral, no such complaint was made either by Aerospace nor any other TELPAK user at that time.

Indeed, Aerospace specifically concedes (Br. p. 17) that it "did not oppose the procedure as such," in part, according to Aerospace, because "as long as user rights were adequately protected we were not prepared to argue that the Commission could not adopt any procedure it chose for determining the various interrelated questions as to the carrier's rates. See, e.g., Federal Communications Commission v. WJR, The Goodwill Station, Inc., 337 U.S. 265, 222 (1949)." Yet, although, as Aerospace goes on to note, it also then urged that the Commission could so defer the commencement of the proceeding on the rate increase only if it prevented the increase from becoming effective pending the determination of these other

proceedings, the fact remains that Aerospace also acquiesced in the Commission's rejection of this contention.

Although Aerospace offers no explanation for this acquiescence, a wholly plausible explanation, we submit, is that neither Aerospace nor the other TELPAK users were interested in pressing the matter at that time. As noted supra pp. 6-7, the TELPAK rate changes which finally became effective in 1968 subject to an accounting, were approximately half as large as those which Bell had originally filed and which were the same as those here involved. Bell had withdrawn its earlier filing in 1968 in response to the objections of the TELPAK users, inter alia, that it was too much to ask them to absorb an increase of such a magnitude all at once. Having thus persuaded Bell to reduce the amount of the TELPAK rate changes for even a temporary period, the TELPAK users may well have shied away from indicating dissatisfaction with the Commission's July 10, 1968 order for fear of upsetting the apple cart.

In any case, irrespective of the reason for Aerospace's failure to take further action at that time, there is no gain-saying the fact that Aerospace's complaints of delay are concerned with the 1968 TELPAK rate changes. Accordingly, these complaints are properly related not to the Commission's order here under review (which deals with the instant, i.e. 1969 TELPAK rate changes) but rather to the July 10, 1968 order, which has long

since become final without judicial review being sought by anybody. Patently, these complaints have no place in the instant proceeding.

2. The Proceedings With Regard to the Instant
TELPAC Rate Changes Have Not Been Delayed

In contrast to the proceedings with regard to the 1968 TELPAK rate changes, the Commission has already indicated an intention that the proceedings with regard to the instant TELPAK rate changes go forward as expeditiously as possible consistent with the complexity of the problems involved. In addition to the fact that Order FCC 69-1196 here under review is the first order issued by the Commission with regard to the instant TELPAK rate changes, the Commission there specifically noted that the reasons for deferring the proceedings relative to the 1968 TELPAK rate changes are no longer operative and, accordingly, did not warrant the deferral of the proceedings with respect to the instant TELPAK rate changes.

Thus the Commission pointed out that a recommended decision had been issued in the TELPAK sharing proceeding in Docket 17457 and further that "the parties in phase 1-B of docket No. 16258 have entered into an agreement as to rate-making principles and factors looking toward determinating that phase * * *" (App. 563; 20 F.C.C. 2d at 388). Consequently, the Commission went on (Ibid.), "* * * we will no longer defer the proceeding in docket No. 18128 and the examiner presiding in that case is authorized to schedule hearings therein at such time as he may deem appropriate." See also, supra, p. 10-11.

A Commission intent that the proceedings with regard to the instant TELPAK rate changes go forward as expeditiously as possible is also evident from its order of July 29, 1969, with regard to the Statement of Rate-Making Principles (App. 214; 18 F.C.C. 2d 761). After there indicating its understanding that Bell had agreed to file certain rate studies, and any related rate adjustments based thereon, by October 1, 1969 (App. 217; 18 F.C.C. 2d at 763), the Commission explained that it was willing to follow the procedures recommended in the Statement because (App. 217; 18 F.C.C. 2d at 764).

"* * * we believe that the procedures will enable us to reach these rate issues with greater dispatch and effectiveness than if further extended hearings were held in docket 16258. Accordingly, it is our judgment that the proposed procedures will provide a better and more timely method of reaching a final conclusion on these important matters and will best conduce to the proper exercise of our statutory authority and promote the ends of justice. * * *"

3. The Commission's Consolidation of the TELPAK Rate Changes With the General Investigation Into Bell's Rates was Necessary and Proper

Aerospace (Br. pp. 14-15, 17-18) also complains in this connection that the Commission denied the prompt hearing on the proper level of the TELPAK rates when it took the "quite unnecessary" action (Aerospace, Br. 14) of making that question a part of the Commission's general investigation into Bell's rates. But, as Aerospace explicitly recognizes (Br. pp. 15-16), the Commission originally took this action by orders issued in 1966. Therefore, since neither Aerospace nor any other TELPAK user

sought judicial review, these orders have long since been final and non-reviewable.

Moreover, as is apparent from the history summarized by Aerospace (Br. pp. 13-14, 15-17), the Commission's general investigation into Bell's rates was instituted in 1965 after the Commission's decision in the original TELPAK case in 1964. Accordingly, while it might appear, as Aerospace argues (Br. p. 14), that it would have been simpler for the Commission to determine the proper level of the rates for TELPAK C and D without inquiry into the interrelationship between these rates and the rates for Bell's other offerings, the fact is, as the Commission has repeatedly stated, that any meaningful determination with regard to the TELPAK rates should be made in the context of Bell's costs and rates for other services. See App. 8, 7 F.C.C. 2d 30, 31; App. 20, 6 F.C.C. 2d 177, 180-181; App. 180-181, 13 F.C.C. 2d 851, 857). A necessary predicate to any finding that TELPAK rates are compensatory obviously is a determination of the costs allocable to these services. This, in turn, cannot be made until there has been a determination of the appropriate rate-making principles applicable to TELPAK and the other services offered by Bell. As the Commission expressly explained in noting the Statement of Rate-Making Principles (App. 215-216, 18 F.C.C. 2d at 762):

"A primary predicate of our initial order of investigation herein was the results of the fully distributed cost study made by Bell in the Domestic Telegraph Investigation, docket 14650, which revealed a wide disparity in the levels of earnings among the various classes of interstate service. It was then, and still remains, our

concern that the basic message toll telephone service (m.t.t.) for which there is no directly competitive service, and which accounts for about 80 percent of the interstate services, should not be burdened by, or required to subsidize, the so-called competitive services. It was, and remains, our concern that, whatever methods are employed to price m.t.t. and other services, they should also accord with sound ratemaking practice and statutory requirements."

Consequently, once the Commission undertook its general investigation into Bell's rates, it would have been subject to serious criticism had it undertaken to determine the proper level for TELPAK rates, independently of its resolution of the appropriate rate-making principles. Indeed, now that the various views as to these principles have been thoroughly developed in the record in Phase 1-B of Docket 16258, the Commission went along with the procedures set out in the Statement of Rate-Making Principles, because, as already pointed out, supra, pp. 9, 33:

"Implementation of the stipulation * * * will permit us to proceed to the testing of specific rate-making principles in the light of the issues in the Telpak-Private Line case (docket 18128), the new program transmission rates, and such additional issues that may arise. * * * Moreover, we believe that the procedures will enable us to reach these rate issues with greater dispatch and effectiveness than if further extended hearings were held in docket 16258. Accordingly, it is our judgment that the proposed procedures will provide a better and more timely method of reaching a final conclusion on these important matters * * * (App. 217, 18 F.C.C. 2d at 764.) Cf. Harvey Radio Laboratories, Inc. v. United States, 110 U.S. App. D.C. 81, 83, 289 F. 2d 458, 460 (1961).

C. The Instant TELPAK Rate Changes are Directed to the Elimination of Unlawful Discrimination

At various places in their briefs, Petitioners suggest, as a reason for granting the relief requested by them, that Bell's earnings are already excessive and hence Bell does not really need the increased revenues which would result from the instant TELPAK rate

changes. See, e.g., Aerospace Br. pp. 9-10, 11, 27-29, Airline Br. pp. 17, 30-31; NAMBO Br. 10-11, 17-18; AP Br. pp. 22-25.

The fallacy underlying this argument is that the TELPAK rate changes here involved do not have as their purpose the raising of Bell's overall revenues to a just and reasonable level. That such was not the purpose is evident from the fact, which Petitioners themselves point out, that Bell has undertaken to offset the increase in revenues which it expects to result from the instant TELPAK rate changes by a corresponding reduction in its revenues from its long distance and WATS offerings, through a reduction in rates for the latter services. Indeed, this was explicitly noted in the Commission order of January 19, 1970 (App. 726, 21 F.C.C. 2d at 3).^{20/}

Rather, the purpose of these rate changes is to achieve a more appropriate balancing of revenues among Bell's various offerings by eliminating unlawfully low and discriminatory rates for TELPAK in accordance with the Commission's findings in the original TELPAK proceeding. Although the Commission there found that the offering of TELPAK C and D may be justified by competitive necessity, that finding relates only to whether there is a feasible competitive

^{20/} As shown infra pp. 54-57, whereas the offsetting reductions in long-distance and WATS rates are without any rights of recoupment in Bell, the TELPAK rate changes went into effect subject to an accounting order so that Bell bears the risks that the Commission find the rate increase to be excessive and require refunds. It is for this reason that there is no substance to the argument made by some of the Petitioners that the Commission has prejudged the TELPAK rate changes in advance of hearing.

alternative (see supra, p. 16), not to the appropriate rates for the offering. To the contrary, the Commission found in this regard that there was no showing that such low rates for TELPAK C and D were compensatory. Indeed, the Commission pointed out that, based on the approximate figures then available (38 F.C.C. at 390):

"It would appear that by virtue of the discount in C and D TELPAK, the company is losing approximately twice the amount of net earnings that the private line business it seeks to retain would produce."

As further stated by the Commission in its order in connection with the Statement of Rate-Making Principles (App. 215-216, 18 F.C.C. 2d at 762), it was concerned "that the [ordinary long-distance] service * * * for which there is no directly competitive service and which accounts for about 80 percent of the interstate services, should not be burdened by, or required to subsidize, the so-called competitive services."

Some idea of the magnitude of subsidy inherent in the original TELPAK rates can be obtained from a "supplemental in-plant cost" study submitted by Bell in the original TELPAK proceedings. As the Commission pointed out in its Tentative Decision in that proceeding, that study shows that without adjustments, Bell's ratio of earnings on claimed investment was 2.6 percent for TELPAK C and minus 1 percent for TELPAK D. See 38 F.C.C. 370, 392. To the same effect was the so-called "Seven-way cost study" covering the 12 months ending August 31, 1964, which Bell submitted in the Commission's Telegraph Investigation in Docket 14650. As summarized in the Commission's order instituting its general investigation into

Bell's rates in Docket 16258 (2 F.C.C. 2d 871), this study

"* * * disclosed wide variations in earnings among the various services. At one extreme, message toll telephone and WATS were earning at the rates of 10 and 10.2 per cent, respectively, while TELPAK, at the other extreme, was earning at the rate of 0.3 per cent, all on the basis of the data as reported by the company and without any adjustment by the Commission."

These wide variations in earnings among the different classes of services offered by Bell was one of the primary reasons which led the Commission to undertake an investigation into "the interstate rate structure of the Bell System to determine the lawfulness of the rate levels and rate relationships within that structure." (Id. at 871-872). In this regard, the Commission stated (2 F.C.C. 2d at 872):

"The importance of such a determination is underscored by the fact that certain of the services involved are furnished by the Bell system in direct competition with services offered by other carriers. To the extent that these services may be underpriced by the Bell System, this may have a competitive impact on such other carriers.
* * *"

The fact is, as the Commission has recognized, that Bell's underpricing of its TELPAK offerings has had a substantial adverse effect upon Western Union. As the Commission expressly noted in its Tentative Decision in the original TELPAK proceeding (38 F.C.C. at 394-395):

"Because of our findings as to unjust and unreasonable discrimination, it is unnecessary to assess TELPAK's lawfulness in relation to competition. We must note in passing, however, that the application of such rates has diverted substantial amounts of revenue from Western Union. For example, uncontroverted evidence indicates that as of April 1962, Western Union has lost an estimated \$1.8 million in

revenue from customers who had shifted their communications requirements to AT&T because of the lower TELPAK rates and an estimated amount of over \$4 million was in immediate jeopardy."

The \$1.8 million figure represented Western Union's revenue loss for only the first fourteen months following the filing of the TELPAK tariff, almost 10 years ago. Needless to say, as of today, that loss has increased manyfold.

In these circumstances, it is apparent, we submit, that granting the relief here sought by Petitioners would not only add to the revenue loss which Western Union has suffered over the years as a result of TELPAK, but would reward Petitioners' continuing and persistent efforts to retain the subsidy inherent in the discriminatory, low TELPAK C and D rates for a still further period of time at the expense of Bell's other customers and to the detriment of Western Union.

D. There Is No Court Ruling Requiring Or
Even Authorizing The Commission To
Reject or Suspend Indefinitely the
Instant TELPAK Rate Changes

Another major facet of Petitioners' position that the Commission erred in failing to reject the instant TELPAK rate changes is that notwithstanding Section 204 of the Federal Communications Act authorizing the Commission to suspend the effectiveness of new rate filings for a period up to 90 days, the Commission nevertheless has authority to reject or suspend indefinitely the instant TELPAK rate changes. Relying primarily on the Supreme Court's holding in Permian Basin Area Rate Cases, 390 U.S. 747 (1968) and other recent decisions

under the Natural Gas Act, such as United Gas Improvement Co. v. Callery Properties, Inc., 382 U.S. 223 (1965); F.P.C. v. Texaco, Inc., 377 U.S. 33 (1964) and F.P.C. v. Hunt, 376 U.S. 515 (1964), Petitioners purport to find this requisite authority in Section 4(i) and 303(r) of the Communications Act. See Aerospace Br. pp. 31-37; Airline Br. pp. 41-45; NAMBO Br. pp. 22-26; AP Br. pp. 13-17.

However, since, as shown earlier, Petitioners have not shown sufficient circumstances justifying the extraordinary relief requested, the Commission properly held that there was no need to decide "at this time the extent of our authority to grant the kind of relief petitioners request." (App. 562, 20 F.C.C. 2d at 386). This is particularly so since, as shown below, the natural gas cases relied on by Petitioners involved highly specialized situations peculiar to regulation of producers under the Natural Gas Act, entirely different and distinguishable from the instant proceeding, and hence the Supreme Court's holdings in these cases are wholly irrelevant here.^{21/}

1. Natural Gas Cases Relied on by Petitioners
Involved Special Situations Peculiar to Producer
Regulation under the Natural Gas Act

Each of the natural gas cases relied on by Petitioners involved aspects of the Power Commission's efforts -- with which the

^{21/} Although in Order FCC 69-1307 dated December 1, 1969 in Docket No. 17534, et al., involving certain rate changes filed by Western Union, the Commission has undertaken to prohibit Western Union from filing any further tariff changes during the pendency of these proceedings, Western Union by letter dated December 22, 1969, advised the Commission that it did not believe that the Commission had authority to impose such a prohibition and reserved its rights with respect thereto.

Courts have been highly sympathetic (see, e.g., Permian, 390 U S. at 792) -- to develop area wide prices as a means of coping with the obviously extremely difficult job of regulating the rates of thousands of independent gas producers under the Natural Gas Act, a job which the Supreme Court described as that of "regulating a diverse and growing industry under the terms of an ill-suited statute." Permian 390 U.S. at 756.

As pointed out in Permian (see 390 U.S. at 756-58), following the Supreme Court's ruling in Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954) that independent producers of natural gas were subject to Commission regulation under the Natural Gas Act, the Power Commission initially undertook to regulate the rates of these producers on the basis of individual cost of service. Since regulation on this basis "became increasingly laborious until, in 1960, it was described as the 'outstanding example of the breakdown of the administrative process' [fn. omitted]" (Id. at 758), the Commission in 1960 acknowledged the gravity of its difficulties and announced an intention to determine maximum rates for producers on the basis of uniform rates for each producing area. The Permian case, decided by the Supreme Court in 1968, was the first involving this experimental undertaking by the Commission.

In recognition of the difficulties involved and time consumed in determining these area prices, the Supreme Court's affirmance of the limited moratorium upon rate filings imposed by the Commission as

part of its area price determination was based on the reasoning, inter-
alia, that if the Commission could not impose such a moratorium,

"[t]he result, as the Commission observed, would be that 'the conclusion of one area proceeding would only signal the beginning of the next, and just and reasonable rates for consumers would always be one area proceeding away.' 34 F.P.C. at 228." (390 U.S. at 779).

More recently, in sustaining a more extensive moratorium on rate filings by individual producers, the Fifth Circuit commented, in dealing with a comparable problem in Southern Louisiana Area Rate Cases, 5th Cir. Nos. 24792, et al. (decided March 19, 1970) (slip Op. pp. 35-36):

"* * *. If the Commission is to discharge its duty of regulating production, it must use the area rate ceiling method or some analogous industrywide approach. It cannot regulate individual producers simply because the strain that approach would put upon its time and resources would be prohibitive. And moratoriums are necessary if the area regulation method is to work at all. Unilateral producer price increases in excess of the ceilings would otherwise involve the Commission immediately in the task of determining whether each increased rate was just and reasonable in terms of the financial position of each individual producer, which is precisely the problem the Commission faced before area regulation and so badly needs to avoid [fn. omitted]. By putting a ceiling on rates in such a manner that the ceiling is likely to cover the just and reasonable rate for a number of years, and imposing a moratorium that lasts no longer than the period that the ceilings are likely to be adequate the Commission can discharge its regulatory responsibilities with minimum encroachment on the salutary procedures contemplated by section 4 [fn. omitted]."

The situation here falls far short of being comparable to that in these natural gas cases. Far from there being any extraordinary circumstances or urgent public need as was the situation in those cases, the situation here, even when viewed most favorably to Petitioners, is at most one in which their asserted entitlement to relief is based

primarily upon alleged irreparable injuries to them. However, even these alleged injuries accrue only because Petitioners are claiming in effect a prescriptive right to the continuation of unlawfully low TELPAK rates and because they have chosen to ignore the repeated warnings to prepare their communication budgets for the contingency that changes in the TELPAK rates such as those are filed and put into effect.

Moreover, it should also be noted that rejection of a rate filing out of hand without any notice or warning in advance of the filing as is here requested by Petitioners is very different from a moratorium which provides advance notice that for the period provided the Commission would not accept further rate filings in order to protect the stability of rates prescribed by the Commission. Indeed, the rates which are being superseded by the TELPAK rate filings here involved are not even Commission-approved, much less Commission-prescribed.^{22/}

22/ United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956) also relied on in this connection by Petitioners (Aerospace Br. p. 35; Airline Br. p. 49; AP Br. pp. 15, 28) is similarly beside the point. Even assuming that the Commission has the authority in appropriate circumstances to reject a rate filing, the problem still remains what are appropriate circumstances; and Mobile does not help Petitioners in this connection here, since Bell's filing of the instant TELPAK rate changes did not violate any contract with any of the TELPAK users. Nor is the position of Petitioners advanced by American Commercial Lines, Inc. v. Louisville and N.R.R., 392 U.S. 571 (1968), United States v. Southwestern Cable Co., 392 U.S. 157 (1968) or the other cases relied on by them in this connection (Aerospace Br. pp. 32-33, 35; Airline Br. 42-43, 45; AP Br. pp. 15, 23; NAMBO Br. pp. 24-25, 26), since none of them involve the type of relief here sought by Petitioners. If anything, the Supreme Court's reference in the American Commercial case (392 U.S. at 591-592) to the ICC's discretion in choosing the procedures to be followed in determining the rates supports the Commission's action here.

2. Permian Does Not Extend to Proscription Generally
Against Pyramiding of Rate Increases

Contrary to the further argument of Petitioners (Aerospace Br. pp. 35-36; Airline Br. pp. 41-42; AP Br. pp. 15-16), the Supreme Court in Permian and related natural gas cases did not overrule the holding in Willmut Gas & Oil Co. v. F.P.C., 111 U.S. App. D.C. 49, 294 F.2d 245 (1961), cert. denied 368 U.S. 975 (1962), that regulated companies generally have a right to file new rates superseding existing rates even though the latter rates were in effect subject to refund. Although Permian and related cases hold that a regulated company does not have an "invincible right to raise prices subject only to a six-month delay and refund liability" (390 U.S. at 779), they do not go to the other extreme of holding that a regulated company may not under any circumstances file any rate changes, or even rate changes superseding rates in effect subject to refund.^{23/}

To the contrary, the Court there held in this regard only (1) that the Commission has authority, in appropriate circumstances, to defeat a company's right to make a rate filing and (2) that the special circumstances of producer regulation under the Natural Gas Act requiring the use of area prices constituted an appropriate occasion for the exercise of such authority. The Court did not hold that the Commission also has authority to reject rate filings where Permian's special circumstances are not present and where its sole effect would be to supersede rates in effect subject to refund. A fortiori, the

^{23/} No pyramiding in the Willmut sense is involved here since the instant TELPAK rate increase is merely the second step of a two-step increase in rates undertaken by Bell out of deference to the complaints of the TELPAK users when it sought to increase the rates to the present level in one step. See supra pp. 6-7.

Court did not hold, as Petitioners in effect urge, that it would be reversible error for the Commission not to reject the superseding rate filing in the latter circumstances. Indeed, the Power Commission itself has not given Permian the broad reading here urged by Petitioners. Instead, where the rate filings have been by pipeline companies and hence do not present the special problems surrounding regulation of independent producers, the Power Commission has not regarded the fact that the rate filing will supersede rates in effect subject to refund as a reason for rejecting that filing.^{23a/} And contrary to the arguments of Petitioners (Airline Br. pp. 28-29, NAMBO Br. pp. 18-19), there is no indication that either the F.P.C. or the F.C.C. have regarded such superseding rate filings as "prejudicing orderly and efficient procedure" or compromising the determination of the proper rate level.

Finally, contrary to the implication of Aerospace (Br. p. 35), this Court's conclusion in Willmut is entirely consistent with the conclusion of the Tenth Circuit in Amerada Petroleum Corp. v. F.P.C., 293 F. 2d 572 (10th Cir. 1961) cert. denied 368 U.S. 976 (1962). The holding in Amerada, deals only with new rate filings made during the period of suspension of a prior filing, which under most regulatory statutes is limited to but a few months. Such a holding obviously has a far more restricted and different impact than a holding such as here sought by Petitioners which would forbid a regulated company from filing new rates while a previous rate filing is in effect subject to refund

^{23a/} See, e.g., El Paso Natural Gas Co., FPC Docket Nos. RP69-6, RP69-20, RP70-11; Consolidated Gas Supply Co., FPC Docket Nos. RP69-19, RP70-2.

or accounting, which experience demonstrates may well last for a far longer period.

3. Bell's Filing of the Instant TELPAK Rates Does Not Violate Any Rate Moratorium

Apparently in an effort to bring the instant case closer to Permian and the related natural gas cases, Airline (Br. pp. 32-33) and NAMBO (Br. pp. 19-20) argue that the instant TELPAK rate filing violates a moratorium imposed by the Commission in its Order FCC 68-388 dated April 12, 1968 (App. 170). This is the order in which the Commission suspended Bell's interim TELPAK rate increase from June 1, 1968, the effective date proposed by Bell, to September 1, 1968, the full 3-month period provided in Section 204 of the Communications Act. See, supra p. 7.

Airline (Br. p. 32) and NAMBO (Br. p. 20) purport to find the alleged moratorium by taking out of context a conditional clause in that order detailing what TELPAK users should expect "in the event a hearing record indicates that increases in the level of TELPAK rates are justified or required." Read in context, this language plainly was not intended to impose the moratorium claimed by these Petitioners.

It will be remembered, as set out supra pp. 6-7, that the TELPAK rate increase which was the subject of the Commission's Order FCC 68-388, had been filed by Bell in March 1968 to replace an earlier and larger increase, and that several TELPAK users had urged the Commission to reject or suspend indefinitely both the original increase and the later, smaller increase on the ground that the amount of even the smaller increase

adversely affected their ability to use TELPAK and that they needed time in order to accomplish the requisite restructuring of the communications services used by them.

In responding to these pleas, the Commission stated in pertinent part (App. 171, 172):

"5. Although the revised rates are filed to become effective on June 1, 1968, we are taking action to suspend them at this early date in order to afford all interested parties the earliest practicable notice thereof and so that TELPAK users may be able to adjust to the new effective date of these tariff schedules.

* * * * *

"8. We are suspending the proposed tariff schedules to the full extent of our statutory authority on the basis of the considerations recited above. This means that the schedules will become effective September 1, 1968. Moreover, it should clearly be understood by the TELPAK users, that, in the event a complete hearing record indicates that increases in the level of TELPAK rates are justified or required, or that the TELPAK classification should be eliminated, any increases occasioned thereby will become effective without delay. The users should henceforth govern themselves accordingly, and their communications budgets should be prepared with this contingency in mind. In this connection, users have been on notice since 1961 that TELPAK rates presented substantial questions of lawfulness requiring formal investigation and that significant increases in these rates could result."

Both the above background and the thrust of the order in which the Commission used the conditional clause relied on by Airline and NAMBO (which is underscored in the above excerpt) plainly negate any intention on the part of the Commission to impose a moratorium on further TELPAK rate increases, as urged by these Petitioners. To the contrary, the clear purport of the Commission's statement is to put

TELPAC users on notice that they should take steps to be prepared for any eventuality with regard to TELPAK, whether it be increased rates or complete elimination of the service.

Any possible question on this score disappears upon examination of the ordering clause of Order FCC 68-388. After there providing for the suspension until September 1, 1968, of the TELPAK rate increase then before it, the Commission went on to direct that (App. 172):

"* * * during said period of suspension no changes shall be made in said tariff schedules or in the charges sought to be altered thereby, unless authorized by special permission of the Commission."

Obviously, if the Commission intended a moratorium of the duration urged by Airline and NAMBO, it would have expressly so provided, instead of limiting its duration to the "period of suspension."^{24/}

II.

BELL HAS NOT VIOLATED ANY AGREEMENT IN FILING THE INSTANT TELPAK RATE CHANGES

In further support of their position that the instant TELPAK rate changes should have been rejected, Aerospace (Br. pp. 18-19, 24-27) and Airline (Br. pp. 32-35) argue that the filing of the instant TELPAK rate changes violated the procedure agreed upon by the parties in the Statement of Rate-Making Principles, noted by the Commission in its order dated July 29, 1969. See App. 214, 217, 18 F.C.C. 2d 761, supra p. 9.

According to these Petitioners, Bell had there agreed not to file new TELPAK rates until the interested parties had been given an

^{24/} As shown supra pp. 45-46, a rate moratorium for the period of suspension is very different from the moratorium of the indefinite duration here urged by Petitioners.

opportunity "to have the studies submitted, assimilated, tested, probed, evaluated, discussed, and, where appropriate, modified, over the reasonable period of time necessary to complete informed as well as informal consultations with carrier and staff" (Airline Br. p. 34). In contrast, Petitioners contend, not only had they not been given any such opportunity as yet, but the cost studies submitted by Bell in support of the rate changes had been made available virtually contemporaneously with the rate filing by Bell.

In so urging, Petitioners read far too much into the Statement. In fact, far from violating the Statement, Bell's filing here is in full accord with the intent and purpose of the understanding there set out.

A. The Procedure Provided in the Statement of Rate-Making Principles Does Not Include the Requirements Urged by Petitioners

The provisions of the Statement relied on by Petitioners appear in paragraphs 2 and 3 in its section relating to procedure. These paragraphs provide in pertinent part (App. 224, 18 F.C.C. 2d at 768):

"(2) * * * While respondents have previously submitted in this record detailed studies and have proposed or effectuated rate adjustments, they propose to make new studies in conformity with the principles agreed to herein, and thereafter to file such further specific rate adjustments as may be consistent therewith. Accordingly, respondents will proceed expeditiously to make such new studies.

"(3) * * * No carrier initiated rate level increases will be filed until the new cost studies described in paragraph (2) have been completed and made available to the parties hereto. The effective date of any such rate level increase will be subject to such authority as the Commission may possess. * * *"

It is, we submit, readily apparent from the above excerpts that there is nothing in these provisions which even suggests that new rates were not to be filed until there has been a final Commission determination as to appropriate cost methodology after hearings in which Petitioners have participated, as urged by Petitioners. As a matter of fact, the language of these provisions which were formulated with Petitioners' participation and assent, explicitly negate any such extensive and time-consuming pre-conditions to the filing of new rates. Thus, the effect of the two paragraphs is to provide that once "the new cost studies have been completed and made available to the parties hereto" Bell was to be free "thereafter to file such further specific rate adjustments as may be consistent therewith." Since, as Airline points out (Br. p. 33), "each word and phrase" in the Statement "was derived after extensive discussion and refinement," the absence of any express reference to the additional requirements which these Petitioners would read into the Statement, plainly negates the presence of any such requirements.

Further evidence, that the only limitation intended by these provisions upon Bell's filing new rates was that it complete and make available the new cost studies to the parties, is provided in paragraph (5)(B) of the procedural section. That paragraph reads in pertinent part (App. 225, 18 F.C.C. 2d at 768):

"(5) In the absence of any direction to the contrary by the Commission, the following procedures will be employed:

"(B) Following the filing of the new studies and proposed rate adjustments by respondents and the institution of, or continuation of, any separate proceedings * * * the Chief of the Common Carrier Bureau will recommend that Phase 1-B of docket No. 16258 be terminated without opinion on the merits by the Commission."

This provision patently does not envision any extensive proceedings, or substantial lapse of time, between the filing of the new rate studies and the proposed rate adjustments, as would be the case under Petitioners' proposed reading.

The Commission's Order noting the Statement of Rate-Making Principles (App. 214, 18 F.C.C. 2d 761) plainly indicates that as far as the Commission was concerned, it understood that the procedures there provided left Bell free to file new rates once the new cost studies had been completed and made available to the parties. Thus, the Commission there noted that (App. 216-217, 18 F.C.C. 2d at 763):

"It is the thrust of the statement that effective testing of the complex economic theories of costing and pricing which have been advanced in this record, and the reconciliation of opposing, or at least partially conflicting, views of expert witnesses, can best be accomplished by relating the principles advocated to specific rate proposals. Bell has agreed that implementing studies called for by the statement, and any related rate adjustments based thereon, can be filed by October 1, 1969. * * *"

Both the Commission's view as to "the thrust of the statement," and its explicit reference to its understanding that Bell could file "the implementing studies called for by Statement and any related rate adjustments based thereon * * * by October 1, 1969" plainly reveal an understanding by the Commission even at that time that far from there being any extensive proceedings, or substantial lapse of time, between Bell's making available the new cost studies and its filing of new rates, Bell had affirmatively undertaken to file TELPAK rate adjustments based on the new cost studies as soon as these studies were completed and made available.

Indeed, such understanding was one of the basic premises underlying the Commission's willingness to go along with the procedures set out in the Statement. Obviously, in order to "test the complex economic theories of costing and pricing by relating the principles advocated to specific rate proposals," it would be necessary for the specific rate proposals to be on file along with the underlying cost studies.

Such an understanding also lies at the foundation of the Commission's further rationale that the procedures provided in the Statement would "enable [the Commission] to reach these rate issues with greater dispatch and effectiveness than if further extended hearings were held in docket 16258" (App. 217, 18 F.C.C. 2d 764). The interpretation urged by Petitioners, on the other hand, would have an opposite result -- it would operate to postpone indefinitely the Commission's decision on specific rate issues with regard to TELPAK and at the same time bestow upon Petitioners and other TELPAK users a substantial voice in the extent of that postponement.

B. Petitioners' Rights Are Fully Protected Under
The Commission's Interpretation of the
Procedures Provided in the Statement of Rate-
Making Principles

The procedures which the Commission thus understood as being set out in the Statement fully protect all of Petitioners' rights, constitutional or statutory. This is so because in accepting the instant TELPAK rate changes for filing and in permitting them to become effective subject to an accounting order, the Commission has not made

any determination, interim or final, as to the lawfulness of these rates. See, also, infra pp. 54-47. Rather, in accordance with the standard procedures typically followed in such situations, the Commission has provided for hearing in which all interested parties will be allowed full participation before the Commission finally determines the just and nondiscriminatory rates for TELPAK C and D. And to make it even clearer, if possible, that it intended to give the TELPAK users a full opportunity to participate, the Commission expressly provided in paragraph 17 of Order FCC 69-1196 here under review (App. 564, 20 F.C.C. 2d at 388):

"That all parties named in paragraph 1, supra, as having filed petitions for relief ARE GRANTED leave to intervene upon filing a notice of intention to appear and participate within 20 days of the release date of this order."

In such a hearing, interested parties, including Petitioners, will be given an opportunity (1) fully to test the methodology used by Bell in making the new cost studies and in arriving at the level of the instant TELPAK rates and (2) to present their own versions as to what is appropriate on each of these matters. This will place the Commission in the position of being able to evaluate various conflicting views on these matters, all in relation "to a specific rate proposal," with regard to TELPAK.

In these circumstances it is plain, we submit, that Bell's filing of the instant TELPAK rate increase shortly after it completed the underlying cost studies and made them available to the interested parties did not violate the procedure set out in the Statement of Rate-Making Principles.

III.

THE COMMISSION HAS NOT PREJUDGED THE PROPER LEVEL OF TELPAK RATES

Petitioners Airline (Br. pp. 21-29) and NAMBO (Br. pp. 13-18) claim that the Commission order here under review should be set aside on the ground that the Commission has evidenced "clear" (NAMBO Br. p. 13) or "apparent" (Airline Br. p. 21) prejudgment with regard to the instant TELPAK rate increase by permitting Bell to offset the increased revenues resulting from the instant TELPAK rate changes with corresponding rate reductions in its long distance and WATS service. In addition to being premature since the Commission's investigation of the TELPAK rate changes is still in the initial stages, this argument which is based primarily upon the Public Notice FCC 69-1210 released November 5, 1969 (App. 572; see also, supra pp. 11-12), is without substance or merit.

But, contrary to the arguments of these Petitioners, the Commission is not guilty of any prejudgment, clear or apparent, by going along with Bell's undertaking to offset the increase in revenues expected to result from the instant TELPAK rate changes by corresponding reductions in its long distance and WATS rates. This is so because Bell expressly recognized, in undertaking to make the offsetting reductions effective simultaneously with effectiveness of the TELPAK rate changes, that it was taking the risk that the Commission would disallow all or part of the TELPAK rate changes. Thus in its Opposition, dated December 2, 1969, to Airline's

petition for reconsideration, Bell noted (App. 637) that:

"The Commission's 'action' of November 5, 1969 (FCC 69-1210), in noting the rate reductions in the [long distance] service agreed to by AT&T merely points out the previous agreement by AT&T* to this effect. Such 'action' in no way binds the Commission to any future action concerning the issues in Docket No. 18128. To the extent that the October 1 TELPAK rates or the revised TWX or Program rates, may be found ultimately to be excessive there is nothing to prevent the Commission from ordering the filing of revised rates and the refund of amounts unlawfully collected prior thereto, and there is nothing in the Commission's conduct of the continuing surveillance proceedings which could in any way compromise its ability to make such findings or orders."

*See Mr. Garlinghouse's letter to Mr. Waple dated October 1, 1969. 25/

Similarly, in its Memorandum, filed in this Court on January 22, 1970, in Opposition to the Motions for Stay, Bell commented (at p.17) that it had proposed to make the offsetting rate reductions

"* * * with full recognition that the rate increases for TELPAK and other private line services had been made subject to investigation by the Commission with the possibility that the Commission might determine that some or all of the rates are unlawful and that refunds could be ordered."

Consistent with this recognition by Bell, the Commission's order dated January 19, 1970, stressed (App. 726-7, 21 F.C.C. 2d at 3):

"* * * the increased rates filed by AT&T must withstand the statutory tests of Sections 201(b) and 202(a) of the Communications Act. If in docket No. 18128, the increased rates are ultimately held to be unlawful,

25/ In this connection, Bell went on to observe (Ibid.): "The question whether lower TELPAK rates or refunds, if any such are ordered, would significantly affect AT&T's overall rate of return or would justify compensating rate increases for other services is purely speculative."

and a reduction is ordered, a refund, with interest, of all increased amounts received by the carrier may be made. AT&T has no resort to any argument that such rates were part of an offset arrangement (fn. omitted). These rates, as all rates filed by carrier initiative, must meet the statutory requirements."

Patently, therefore, permitting Bell to make effective its offsetting reductions in long distance and WATS rates when the instant TELPAK rate changes became effective did not involve any "trading" of the rights of the TELPAK users (Airline Br. p. 23) or any prejudgment by the Commission as to the proper level for TELPAK rates. The determination of that level will be the subject of an evidentiary hearing at which all parties including the instant Petitioners will have an opportunity to participate fully and the decision of the Commission will stand or fall on the basis of the record made at that hearing. In a word, none of Petitioners' rights, constitutional or statutory, have been infringed upon by virtue of the Commission's permitting the offsetting rate reductions to become effective simultaneously with the TELPAK rate changes.

In this regard, there should also be noted the consequences which might have resulted had the Commission declined to permit the offsetting rate reductions. If in such circumstances, the TELPAK rate changes had ultimately been found to be reasonable even in part, it would be difficult, if not impossible, to achieve an offsetting reduction in Bell's long distance and WATS rates for the period that the TELPAK rates were under investigation, and as a result, Bell's overall revenues during that period would have been excessive by at least this amount.

Finally, contrary to the suggestion of Airline (Br. p. 24) and NAMBO (Br. p. 14 n. 6), the statements of Commissioners Cox and Johnson cited there do not evidence any prejudgment on the part of these Commissioners -- least of all, as to the proper level of TELPAK rates. In view of TELPAK's long history dating back to 1961 and the extensive hearings on the lawfulness of the original rates, it is only reasonable to expect that the Commissioners have acquired views on the matter. Indeed, the views here expressed by Commissioner Cox are comparable to those set forth in his statement, on the basis of the record in the original TELPAK proceeding, issued in connection with the Commission's decision in that proceeding. See supra p. 20; compare United States v. Morgan 313 U.S. 409, 420-421 (1941); F.T.C. v. Cement Institute, 333 U.S. 683, 700-703 (1948); Skelly Oil Co. v. F.P.C. 375 F. 2d 6, 17-18 (10th Cir. 1967).^{26/}

Not only is there thus no prejudgment on the part of these Commissioners, but even if it be assumed arguendo that there were, it would mean only that they would be disqualified from further participation in the proceeding, not that the entire TELPAK rate filing should be rejected as urged by these Petitioners.

^{26/} Texaco Inc. v. F.T.C., 118 U.S. App. D.C. 366, 336 F. 2d 754 (1964), vacated on other grounds 381 U.S. 739 (1965), and Cinderella Career and Finishing Schools Inc. v. F.T.C., D.C. Cir. No. 22624 (decided March 20, 1970), relied on by Petitioners (Airline pp. 27-28, NAMBO pp. 10-11, 15) are distinguishable for the reasons, among others, that the statements there held to reflect prejudgment had disclosed a predetermined notion as to the specific ruling the agency should make against a specific respondent, arrived at even before a record has been compiled in a proper proceeding.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the orders of the Federal Communications Commission here under review should be affirmed.

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REPLY BRIEF FOR PETITIONER
NATIONAL ASSOCIATION OF MOTOR BUS OWNERS

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 23,833, 23,836, 23,839,
23,841, 23,842, 23,843

THE ASSOCIATED PRESS,
AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC.,
AIR TRANSPORT ASSOCIATION OF AMERICA, ET AL.,
AMERICAN TRUCKING ASSOCIATIONS, INC.,
AERONAUTICAL RADIO, INC.,
NATIONAL ASSOCIATION OF MOTOR BUS OWNERS,
Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
THE WESTERN UNION TELEGRAPH COMPANY,
Intervenors

Petitions for Review of Orders of the
Federal Communications Commission

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AMERICAN TRUCKING ASSOCIATIONS, INC.,
AERONAUTICAL RADIO, INC.,
NATIONAL ASSOCIATION OF MOTOR BUS OWNERS,
Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
THE WESTERN UNION TELEGRAPH COMPANY,
Intervenors

**Petitions for Review of Orders of the
Federal Communications Commission**

**REPLY BRIEF FOR PETITIONER
NATIONAL ASSOCIATION OF MOTOR BUS OWNERS**

INTRODUCTION

This reply brief will deal with the contentions of the opposing parties (the Commission, AT&T and Western Union) in three basic areas, namely, the prejudgment area, the power and duty of the Commission to reject the Telpak rate increase involved, and the reviewability of the Commission's refusal to take such action. These are the prin-

principal subjects dealt with by petitioner NAMBO in its main brief and, as hereinafter shown, none of the opposing arguments in these areas has sufficient validity to counteract the basic need for relief shown by NAMBO and other petitioners.

THE OPPOSITION HAS NOT REFUTED THE CLEAR INFERENCE OF PREJUDGMENT

NAMBO has shown in its main brief that this case involves serious questions of prejudgment. The Commission's action in coupling the TELPAK rate increase with message toll service rate decreases in a package agreement with AT&T at the conclusion of informal "continuing surveillance" meetings with the carrier created a clear inference that the Commission had already approved the TELPAK rate increase. An early manifestation of such apparent approval occurred when the Commission refused to prevent that increase from becoming effective, despite prior assurance that TELPAK rate increases would be made effective only if justified by "a complete hearing record."¹

The Commission and AT&T obviously disclaim any kind of package arrangement. Significantly, however, they *never* deny the course of negotiations between them as described in the dissenting opinion of Commissioner Johnson.

Commissioner Johnson's own language clearly demonstrated that the total package of rate reductions and increases, including the TELPAK increase, was a matter of negotiation and private agreement between the Commission and AT&T,² an agreement reached without consultation with or the knowledge of NAMBO and other user groups who were contesting the TELPAK increase. The failure of the Commission and AT&T to deny the truth of Commissioner

¹ FCC 68-388 (1968) (J.A. 172).

² FCC 69-1210 (1969) (J.A. 576, 579-580). The details of such negotiations as described by Commissioner Johnson are set forth in NAMBO's main brief at pp. 8-9.

Johnson's statements constitutes a clear admission that such negotiations and private agreement did take place and that prejudgment of the rights of NAMBO and other user groups did in fact occur.

Western Union is quite frank in admitting the existence of such prejudgment. It considers the rate reductions and increases accomplished by the surveillance proceeding, including the TELPAK increase, as necessary to eliminate unlawful TELPAK rates, stating that "the purpose of these rate changes is to achieve a more appropriate balancing of revenues among Bell's various offerings by eliminating unlawfully low and discriminatory rates for TELPAK in accordance with the Commission's findings in the original TELPAK proceeding."³ Western Union is quite correct. The purpose of the surveillance action was indeed to make a final determination that the TELPAK rates then in existence were "unlawfully low and discriminatory." This is precisely what NAMBO and others are complaining of in this case. The Commission made the kind of final determination described by Western Union in advance of any hearing on the issue. The Commission has never determined on a hearing record that the original TELPAK C and D rates were "unlawfully low and discriminatory", nor has it made any such determination as to the first round of TELPAK rate increases which became effective September 1, 1968. Both rate levels are at issue in Docket 18128, a proceeding as to which no hearing has yet been held. Clearly the Commission's surveillance action as described by Commissioner Johnson and Western Union has prejudged the rights of NAMBO and other parties to a full and fair hearing on the TELPAK rate issues involved in that proceeding.

³ Western Union Br., p. 36.

OPPOSITION AUTHORITIES ON PREJUDGMENT DISTINGUISHED

NAMBO showed in its main brief that the prejudgment aspects of this case fell within the type of agency conduct proscribed by this Court in two well-known decisions on the subject. See *Cinderella Career and Finishing Schools, Inc. v. FTC*, Case No. 22,624 (U.S. App. D.C. March 20, 1970); *Texaco, Inc. v. FTC*, 118 U.S. App. D.C. 336, 366 F. 2d 754 (1964), *remanded on other grounds*, 381 U.S. 739 (1965).

The Commission, AT&T and Western Union attempt to avoid the significance of the *Cinderella* and *Texaco* cases by asserting that they can be distinguished on the grounds (1) that the issue of prejudgment in such cases was decided on judicial review of final agency action and not in advance of that action, and (2) that the relief requested was merely the disqualification of a single member of the agency, not the entire agency.

The short answer to the first of these contentions is that the opposing parties' version of the law is incorrect. The issue of prejudgment has in fact been judicially determined in advance of final agency action. The best illustration of such judicial action is the decision of this Court in *Amos Treat & Co. v. SEC*, 113 U.S. App. D.C. 100, 306 F. 2d 260 (1962).⁴ As this Court recognized, such action is always available in unusual circumstances, such as this case, where the Court is "confronted by a situation where the asserted infirmity is fundamental." *Amos Treat & Co. v. SEC*, *supra*, 306 F. 2d at 265. The power of the Court to afford relief in such circumstances is also discussed in *SEC v. R. A. Holman & Co.*, 116 U.S. App. D.C. 279, 281, 323 F. 2d 284, 286 (1963), *cert. denied*, 375 U.S. 943 (1963), a case cited by AT&T. The carrier's reliance on this case as eliminating any judicial determination in advance of final

⁴ See also *Air Transport Association of America v. Hernandez*, 264 F. Supp. 227 (D.D.C. 1967).

agency action, no matter how compelling the need, is clearly incorrect.

Moreover, it should be emphasized that NAMBO and the other petitioners are not requesting judicial interference with the pre-existing rate proceeding before the Commission. No request has been made to the Commission or the Court that such proceeding (Docket 18128, *et al.*) not be held or that the Commission not consider the issue of increased rates (as well as possible decreases in rate level) upon completion of the record in that proceeding.⁵ Instead, such petitioners are seeking review of what, in essence, amounts to final agency action on one aspect of that proceeding, namely, denial of requests by petitioners for rejection of the latest TELPAK rate increase.

It cannot reasonably be disputed that such refusal to reject is final in nature. Nothing in the Commission's Memorandum Opinion and Order of January 16, 1970, which denied such relief, gives any indication that the Commission would change its mind on this matter after hearing and direct retroactive rejection of the rate increase. On the contrary, every statement of the Commission in its January 16, 1970 Order, in its pleadings to this Court on the stay motions, and in its brief, clearly and emphatically demonstrates that the Commission has resolved the question of rejection finally and for all time. There is no need to await further developments in the administrative proceeding to throw light on the issue. All of the facts are before the Court in the Commission's own decisions and other releases.

Finally, it must be emphasized that we are not here dealing only with the threat of possible prejudgment. A major

⁵ The Docket 18128 proceeding involves issues as to three levels of TELPAK rates, and issues as to the appropriate levels of virtually all of AT&T's other private line rates as well as its entire message toll service. The prejudgment issue relates only to the Commission's permitting to go into effect under an accounting the third and highest level of TELPAK rates involved in the proceeding.

effect of the prejudgment has already occurred, namely, the failure of the Commission to live up to its earlier assurances that there would be no further TELPAK rate increases until Commission action based on the justification of a "hearing record".⁶ As shown in NAMBO's main brief, this failure to reject has an immediate and permanent impact on NAMBO and the other petitioners, regardless of the Commission's ultimate action after hearing in the Docket 18128 proceeding. Accordingly, it is clear that the petitioners are not asking the Court to take the kind of premature action on prejudgment issues which was condemned in the several cases cited in the opposing briefs.

It is also clear that NAMBO and the other petitioners are not seeking disqualification of the entire agency in the Docket 18128 proceeding, as the opposing briefs would have the Court believe. As indicated above, such petitioners are not attempting to prevent the Commission from hearing that proceeding or from deciding any rate level therein, including the highest TELPAK rates espoused by AT&T and contained in its second round of proposed increases.

The complaint of NAMBO and other petitioners is directly against the Commission's failure to maintain the moratorium against further TELPAK increases which in April and July, 1968, it led the industry to believe it had established pending final resolution of the adversary proceedings. Rather than attempting to restrict or eliminate future agency action, NAMBO and other petitioners are seeking reversal of specific prior action by the Commission which such petitioners assert was based on a misconception of responsibilities and prejudgment or apparent prejudgment. The Courts have many times indicated they would strike down specific prior agency action which had been prejudged by the entire agency rather than by only a

⁶FCC 68-388 (1968) (J.A. 172).

minority of its members.⁷ Such reversal of agency action does not necessarily mean that the agency is disqualified even from rehearing on remand,⁸ and certainly does not mean that the agency is disqualified from hearing a major pending proceeding in which the prejudged action relates to only one of many issues and where the judicial review serves to correct the effect of the prejudgment on the further progress of such proceeding.

AT&T (but not the Commission and Western Union) also asserts that the *Cinderella* and *Texaco* cases are distinguishable on the ground that in those cases the prejudicial statements were not made in the course of discharging statutory duties. The cases cited in support of this proposition do not apply, since they relate to situations where the agency was required by statute or other congressional command to take action which would amount to a prejudgment of future proceedings.⁹ Here there was no such requirement. The Commission was not compelled to "offset" message toll rate decreases with increases in TELPAK rates, nor were the dissenting Commissioners compelled to make prejudicial statements in their dissents on length of suspension. Such actions fall within the normal prejudgment situation where the prejudicial action by the agency is on its own initiative and not mandatory in nature. In such cases, the fact that the prejudgment occurs in the course of performing statutory duties, rather than in some other context, is immaterial. Prejudgment actions evidenced in the course of conducting statutory duties (e.g., by an Examiner in the course of a hearing) have been just as uni-

⁷ See *Pillsbury Co. v. FTC*, 354 F. 2d 952 (5th Cir. 1966); *Wasson v. Trowbridge*, 382 F. 2d 807 (2d Cir. 1967); *Brady v. Trans World Airlines, Inc.*, 167 F. Supp. 469, 472 (D.Del. 1968), and cases cited therein.

⁸ *Pillsbury Co. v. FTC*, *supra* at 965.

⁹ *FTC v. Cement Institute*, 333 U.S. 683, 700-3 (1948); *Pangburn v. CAB*, 311 F. 2d 349 (1st Cir. 1962); *Southern Ry. v. United States*, 186 F. Supp. 29, 41 (N.D. Ala. 1960), *aff'd*, 294 F. 2d 850 (5th Cir. 1961).

formly struck down by the courts as have those which occurred beyond the scope of a statutory duty.¹⁰

Finally, Western Union contends that *Cinderella* is "distinguishable" on the ground that "the statements there held to reflect prejudgment had disclosed a predetermined notion as to the specific ruling the agency should make against a specific respondent, arrived at even before a record has been compiled in a proper proceeding." It is difficult to understand Western Union's point, since the quoted language is an apt characterization of the thrust of a part of petitioners' contentions in this proceeding. Western Union has inadvertently given a good description of the similarities of *Cinderella* and the instant proceeding. It should be emphasized, however, that this proceeding presents an even more immediate effect of prejudgment than *Cinderella* or *Texaco*. Here the Commission has not only indicated a predetermined notion as to ultimate result but has also already taken specific action to the prejudice of petitioners, namely, a reversal of its prior moratorium policy and refusal to hold the line against further rate increases *pendente lite*. Insofar as petitioners are concerned, the "predetermined notion" has in large part ripened into prejudicial reality.

THE COMMISSION HAD THE DUTY TO REJECT THE SECOND ROUND OF TELPAK RATE INCREASES

As pointed out in NAMBO's main brief, the Commission in its April 10, 1968 order (which suspended the first round of TELPAK rate increases) stated that further TELPAK rate increases would be made effective in the event justified by "a complete hearing record".¹¹ This was emphasized

¹⁰ *In re Murchison*, 349 U.S. 133 (1955); *Wasson v. Trowbridge*, 382 F. 2d 807 (2d Cir. 1967); *NLRB v. Phelps*, 136 F. 2d 562 (5th Cir. 1943); *Whitaker v. McLean*, 73 App. D.C. 259, 118 F. 2d 596 (1941). Cf. *Gilligan, Will & Co. v. SEC*, 267 F. 2d 461, 468-9 (2d Cir. 1959), *cert. denied* 361 U.S. 896 (1959).

¹¹ FCC 68-388 (1968) (J.A. 172).

in the Commission's July 10, 1968 order where it held that determinations of applicable ratemaking principles and factors, of the appropriate over-all rate level for each class of service, and of the relationships of these rate levels among the various classes of service were "of threshold essentiality" to a determination of the reasonableness and lawfulness of specific rates including TELPAK.¹² The clear impression given by these two orders was that there would be no further rate increases until completion of a hearing on the TELPAK rate issues.

This "moratorium" was clearly justified and manifestly should have been adhered to by the Commission. The TELPAK rate complex had been before the Commission since 1961. There had never been a determination of the basic issue as to the compensatory nature of the original TELPAK C and D rates. The Commission had given the parties constant assurance that such an issue still existed and that they were entitled to a determination thereof based on a hearing record.¹³ Further, issues relating to the first round of TELPAK rate increases had likewise been deferred, despite the commands of Section 204 of the Communications Act.

Finally, no determinations have been made as to proper cost allocations among AT&T's interstate services. While cost allocation studies have been presented by AT&T at the request of the Commission's Common Carrier Bureau, none of these studies has even been subject to cross-examination or rebuttal evidence. Their validity has never been tested in the crucible of a full hearing and adjudicated by the Commission.¹⁴

¹² FCC 68-711, 13 F.C.C. 2d 853, 856 (1968) (J.A. 180).

¹³ See NAMBO's main brief, p. 5.

¹⁴ The reliance now by the Commission and Western Union on the results of these studies is clearly improper. See FCC Br., pp. 7-8; Western Union Br., pp. 37-38. The Commission's reliance is simply another indication of its apparent prejudgment of the pending Docket 18128 proceeding.

In such a posture, it is clear that the Commission had the duty to maintain the moratorium on further TELPAK rate increases which its orders of April 10 and July 10, 1968 appeared to have created. The arguments of the opposing parties to the contrary fly directly in the face of the clear meaning of the Commission's language in such orders and wholly ignore the unique climate of long-unresolved issues described above which enveloped the TELPAK offering at the time the Commission declared its apparent moratorium and which has continued unabated since that time.

Further, it should be emphasized that the Commission's duty to reject the second round of TELPAK rate increases, which violated its "moratorium", was made even greater by the apparent prejudgment of that second round as a result of its surveillance action. As shown in the main briefs of NAMBO and other petitioners, such rejection was necessary to achieve a fair and objective hearing in Docket 18128 unencumbered with any previously-approved (or apparently previously-approved) rate level as part of the "issues". The Commission's failure to cure its prejudgment or apparent prejudgment by such action was a clear breach of duty and abuse of discretion quite apart from the failure to live up to its previous moratorium assurances.

THE COMMISSION HAD THE POWER TO REJECT THE SECOND ROUND OF TELPAK RATE INCREASES

The Commission's refusal to reject the further TELPAK rate increases has caused irreparable injury (now largely admitted by the opposing parties) which clearly justifies reviewability under this Court's test in *Isbrandtsen* case:¹⁵

"The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the

¹⁵ *Isbrandtsen Co. v. United States*, 93 U.S. App. D.C. 293, 297-98, 211 F. 2d 51, 55-56 (1954), *cert. den.* 347 U.S. 990 (1954).

review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control."

Significantly, the Commission does not contend that it lacks the power to take the rejection action which NAMBO and the other petitioners have requested. It frankly states that its "orders do not hold that the agency lacks the requisite authority" to take such action¹⁶ and further admits that the Commission is not "powerless to protect its processes from a long succession of rate increases which threaten to postpone indefinitely any determination of their lawfulness".¹⁷

Similarly, AT&T and Western Union have retreated considerably from their earlier dogmatic assertions that the Commission lacked any power at all to reject rate increases, whatever the circumstances involved.

While the carriers still attempt to rely on *Willmut Gas & Oil Co. v. FPC*,¹⁸ they now recognize that even if that case still has any validity, there are a large number of exceptions as to its application.

Thus Western Union admits¹⁹ that in cases involving "appropriate circumstances" or "special problems" the

¹⁶ FCC Br., p. 26.

¹⁷ FCC Br., p. 30, fn. 18.

¹⁸ *Willmut Gas & Oil Co. v. FPC*, 111 U.S. App. D.C. 49, 294 F. 2d 245 (1961), cert. den. 368 U.S. 975 (1962). The Commission, of course, does not even cite *Willmut*, let alone rely on it. As indicated in the airline industry, petitioners' initial brief (p. 42), the broad language in the *Willmut* case on lack of any agency power to reject rates has been superseded by recent decisions of the Supreme Court, which have clearly recognized the existence of such power under appropriate circumstances.

¹⁹ WU Br., pp. 44-45.

Willmut approach will not apply and an agency would have authority to reject rate increase filings. As heretofore shown, this is clearly a case involving "appropriate circumstances" and "special problems" justifying agency rejection action.

AT&T also appears to recognize that the *Willmut* approach would not apply in situations where the regulatory agency found "that the subsequent rate increase would interfere with the discharge of the agency's regulatory responsibilities".²⁰ The Commission itself recognizes the validity of this rationale, since it recently used it to prevent Western Union from filing further rate increases during the pendency of a rate increase proceeding.²¹ Again, as previously shown, the record in this case compels such a finding, and the agency's failure to make it was a clear abuse of discretion.

Further, AT&T recognizes that *Willmut* does not apply, and *Permian Basin*,²² *Callery*,²³ *Texaco*²⁴ and similar cases do apply, to situations where the agency is asked "to reject a tariff that is demonstrably unlawful on its face because directly in conflict with a statute, agency regulation or order".²⁵ What AT&T fails to acknowledge is that NAMBO and other petitioners do contend that the TELPAK filing and the Commission's refusal to reject it violated agency orders, namely, those orders of April 10 and July 10, 1968, which imposed a practical moratorium on further TELPAK rate increase filings pending com-

²⁰ AT&T Br., p. 27.

²¹ Order FCC 69-1307, dated December 1, 1969, Docket 17534, *et al.* AT&T and Western Union rather lamely acknowledge the existence of this action in footnotes to their briefs (AT&T Br., p. 27; Western Union Br., p. 40).

²² *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

²³ *United Gas Co. v. Callery Properties*, 382 U.S. 223 (1965).

²⁴ *FPC v. Texaco, Inc.*, 377 U.S. 33 (1964).

²⁵ AT&T Br., p. 24.

pletion of the litigated rate controversy then in being.²⁶ Such contentions place this case squarely within even the narrow construction of *Permian Basin*, *Callery* and *Texaco* contended for by AT&T and Western Union.²⁷

Finally, Western Union weakly attempts to distinguish *Amerada Petroleum Corp. v. FPC*,²⁸ on the ground that the rejection action there upheld involved the rejection of a rate increase filed during the suspension period of an earlier filing and that such action has "a far more restricted and different impact".²⁹ Western Union's contentions, however, miss the point. The *Willmut* case approach, broadly construed, would deny a regulatory agency any power to reject rate filings, whereas the *Amerada* case recognizes the existence of a power to reject whenever the Commission has a sound rationale for taking such action. While the *Willmut* case finds no expansion of the Commission's powers in Section 16 of the Act,³⁰ the general power section comparable to Section 4(i) of the Communications Act, the *Amerada* case holds that such section "is a sweeping grant of administrative authority to be exercised in the sound discretion of the Commission" and relies upon it as a principal reason for upholding the Commission's rejection action.³¹

²⁶ See NAMBO's Brief, pp. 18-20. The Commission's failure to reject also constituted a statutory violation, namely, a frustration of both the letter and spirit of the expedition provisions of Section 204 of the Act insofar as the first round of TELPAK increases was concerned.

²⁷ As shown in NAMBO's Brief, pp. 22-26, these cases have much broader application and recognize considerably greater agency power to prevent rate increase filings than such carriers will admit.

²⁸ *Amerada Petroleum Corp. v. FPC*, 293 F. 2d 572 (10th Cir. 1961), cert. denied 368 U.S. 976 (1962).

²⁹ WU Br., p. 45.

³⁰ *Willmut Gas & Oil Co. v. FPC*, supra, 111 U.S. App. D.C. at 54, 294 F. 2d at 250.

³¹ *Amerada Petroleum Corp. v. FPC*, supra, at 575.

In view of the admitted exceptions to the early *Willmut* case, the broad sweep of the Supreme Court decisions handed down in recent years and the Commission's own interpretation of its power, it is clear that the Commission had ample authority to take the rejection action requested by the petitioners.

THIS COURT HAS JURISDICTION TO REVIEW THE COMMISSION'S REFUSAL TO REJECT

The opposing parties have abandoned much of their reliance upon the alleged non-reviewability of the Commission's action. Neither AT&T nor Western Union devotes much attention to this issue. AT&T does not advert to the matter until the very end of its brief, and Western Union covers it only in a footnote. While the Commission devotes more attention to shielding its action from judicial scrutiny, it also places greater reliance on other arguments, particularly the broadness of the discretion it allegedly had in passing upon the contentions of petitioners.

In any event, the argument must fail. In the first place, the *Arrow* case³² is clearly not governing in this type of proceeding. No matter how the opposing parties try to characterize or expand this case, the fact remains that it deals with the reviewability of a refusal to *suspend* a rate filing and not with the reviewability of a refusal to *reject* such a filing. This is a rejection case, not a suspension case, and *Arrow* is inapplicable to it. The Commission's orders complained of are final orders with respect to denial of petitions to reject, and the opposing parties have cited no authorities to the contrary. In fact, the case heavily relied upon by AT&T and Western Union in regard to the power of the Commission to reject, namely, *Willmut Gas & Oil Co. v. FPC*, *supra*, is strong support for the reviewability of such rejection action as, of course, are

³² *Arrow Transportation Co. v. Southern Railway Co.*, 372 U.S. 658 (1963).

the more recent Supreme Court and other cases cited by NAMBO in its main brief (p. 27).

Further, the opposing parties wholly ignore the fact that petitioners are not only seeking review of agency refusal to reject a pyramiding of rate increases contrary to previous declarations of a moratorium on such increases but are also seeking review of agency refusal to grant relief from prejudgment. The Commission's refusal to take corrective action on the prejudgment question obviously affords an independent ground for reviewability.³³

CONCLUSION

For the above reasons and the reasons stated in NAMBO's main brief, it is respectfully submitted that the actions of the Commission under review should be reversed and the cause remanded to the Commission for further proceedings in order that the Commission may reject the TELPAK rate filing here involved.

Respectfully submitted,

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³³ See pp. 5-6, *supra*. As there indicated, the Commission's action on the prejudgment question amounts, in essence, to final agency action. Further, even if such were not the case, courts have been willing to decide the issue of prejudgment in advance of final agency action in exceptional cases—which this certainly is—where such action is clearly required. *Amos Treat & Co. v. SEC, supra*; *Air Transport Association of America v. Hernandez, supra*.

REPLY BRIEF FOR
AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,836

AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents,

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
and THE WESTERN UNION TELEGRAPH COMPANY,

Intervenors.

(Consolidated with Case Nos. 23,833,
23,838, 23,841, 23,842 and 23,843)

Petitions to Review Orders of the
Federal Communications Commission

United States Court of Appeals
for the District of Columbia Circuit

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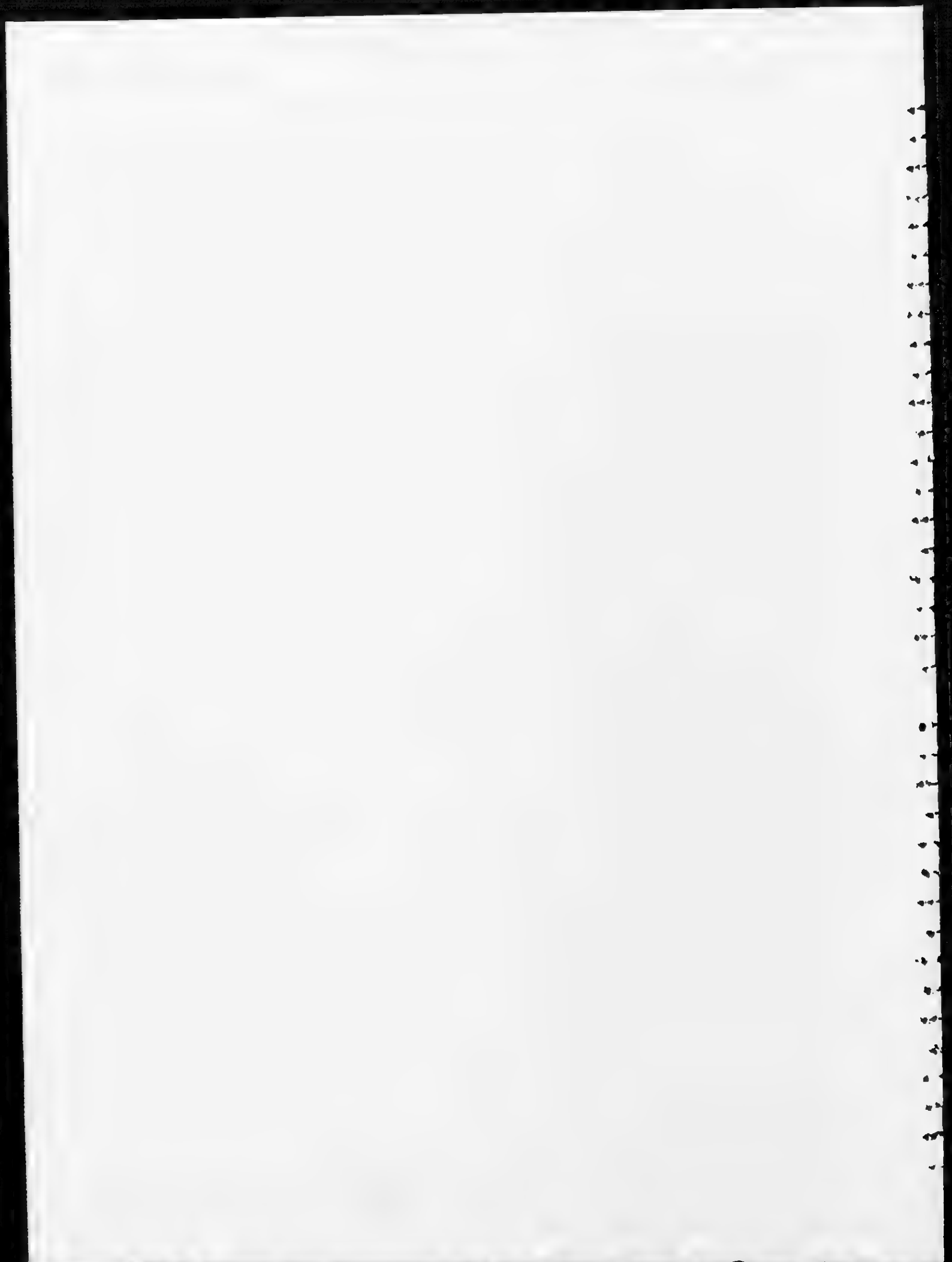


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23,839, 23,841, 23,842 and 23,843)

Petitions to Review Orders of the
Federal Communications Commission

REPLY BRIEF FOR
AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC.

Aerospace Industries Association of America, Inc. ("AIA"), petitioner in
case No. 23,836, herewith files its Reply Brief in the above-entitled proceeding.

INTRODUCTION

The issues in this case fall into perspective in the light of the historical background. In 1965 the Federal Communications Commission instituted, in Docket 16256 and, pursuant to Section 205 of the Communications Act of 1934, as amended (47 U.S.C. 205), an extensive formal, on-the-record investigation into AT&T's interstate rate level and rate structure. *American Telephone & Telegraph Co.*, 2 F.C.C. 2d 871 (1965). This formal proceeding was intended to supplement and "strengthen," not to supersede, the process of "continuous surveillance" under which AT&T's rates had been informally "regulated" by the Commission in the past. *American Telephone & Telegraph Co.*, 2 F.C.C. 2d 173, 177, 178 (1965). Thereafter, the Commission also instituted special investigations into Telpak Service and the lawfulness of the Telpak sharing regulations.¹ And, in recent years, it has moved to improve the information gathering procedures of its still informal and *ex parte* rate level surveillance process, providing, *inter alia*, for oral submissions by the carrier before the Commission and for a special staff group to act as spokesmen for the public therein.²

These actions were not only time consuming, but largely exhaustive of the Commission's limited staff resources.³ Accordingly, since the Telpak rate increases here involved were part of the subject matter of the overall rate investigation, the Commission chose first to defer hearings concerning the legality of the rate increases pending completion of the relevant portions of the on-going Section 205 proceedings and, then, when these latter proceedings proved difficult to conclude, folded the proceedings involving the specific Telpak

¹ See AIA Opening Brief, pp. 5-6.

² See AIA Petition for Stay in this proceeding, App. D.

³ To the extent that the informal and *ex parte* procedures touched upon matters which were also the subject of formal proceedings, they also exposed the Commission and its staff to at least the appearance of prejudgment of those matters.

rate increases into the broader proceedings. The Commission did so, notwithstanding the express mandate of Section 204 of the Communications Act, as amended (47 U.S.C. 204), which requires that proceedings involving rate increases be preferred and expedited.

AIA has not contested the power of the Commission so to order its business by virtue of powers conferred upon it elsewhere than in Section 204,⁴ however, if contrary to AIA's constant urgings the Commission is not going to give the discrete rate increase proceedings the priority consideration required by Section 204, the Commission's exercise of discretion as to the manner in which it handles its work load must be accompanied by an exercise of discretion to prevent new rate filings or preclude them from becoming effective. It simply is not good enough for the Commission to consider only its own convenience while ignoring the statutory rights of communications users.

I. The Continuing Failure to Afford the Prompt Hearing Required by Section 204 of the Communications Act.

As emphasized above, a principal claim made by AIA in its Opening Brief is that if the Commission chose to subordinate the hearings on the Telpak rate

⁴ See AIA Opening Brief, pp. ³¹⁻³⁴~~00-00~~. We do not agree, however, with the Commission's apparent view that it *cannot* decide whether the Telpak rate increases meet the "just and reasonable" standard of Section 201(d) of the Act without consideration of the relationship of the relative level of the Telpak rates to the rates for the carriers' other services. Though the Commission stresses that the rate increases were solely a matter of AT&T's initiative (J.A. 725), AT&T has never attempted to meet its statutory burden for justifying the rate increases on the basis of their relationship to any other rate. The Commission, of course, could properly believe that a general proceeding looking into the relationship of the rates for AT&T's various services, and their consistency with the standards of Section 202 of the Act dealing with "discriminations and preferences" was also required, and institute such a proceeding pursuant to its authority under Section 205 of the Act. But there was no legal necessity for deferring the Section 204 proceeding on the rate increases, to which the statute gives "preference over all other matters pending before the Commission," to await the outcome of the broader inquiry. For, obviously, it cannot be contended that the Telpak rate increases, to whatever extent they may be justified, enhance any relative advantage the Telpak service has over AT&T's other services.

increases, which Section 204 requires be given priority over all other matters, to a general proceeding on all AT&T private line rates, the Commission was required, in the circumstances here involved, to exercise its statutory discretion to prevent the new rate increases from becoming effective prior to the completion of the enlarged proceeding. To this argument the Commission and the intervenors have responded that any failure of the Commission to comply with the provisions of Section 204 involved only the first Telpak increase, which became effective September 1, 1968, and no appeal was taken from the Commission's action deferring hearings relating to those increases.⁵ With respect to the second increase, which is the subject of the present action, we are told: "The Commission ordered hearings to begin on November 1, 1969 . . ." and it is "moving in an orderly way toward the resolution of a complex problem." (FCC Brief, p. 32).

These statements are wholly inaccurate. The Commission's order under review did *not* direct any hearing to begin on November 1, 1969, or on any other early date. It merely stated "we will no longer defer the proceedings in Docket No. 18128, and the examiner presiding in that case is authorized to schedule hearings therein at such time as he may deem appropriate." (J.A. 563). It is true that a joint prehearing conference involving Docket 18128 and two other rate increase proceedings was held on January 8, 1970, virtually the end of the suspension period, and another prehearing conference was held on July 10, 1970.⁶ *But no hearing on the new rate increase has yet commenced, over eight months after the rate increase was suspended.*

⁵ See FCC Brief, pp. 31-32; Western Union Brief, Point I.B.1; AT&T Brief, Point II.B.

⁶ At the July 10, 1970 prehearing conference a further prehearing conference was scheduled for September 17, 1970, and the hearings themselves were tentatively scheduled to begin on September 22, 1970.

The Commission's concept of the "orderly manner" in which to meet its statutory obligations under Section 204 was further clarified when, on February 18, 1970, it *sua sponte* incorporated into the proceeding on the Telpak rate increase — which already provided for consideration of most of the other private-line services — issues as to the proper levels of the MTT and WATS interstate message service rates as well.⁷ This action led to a number of petitions for reconsideration or clarification. AIA argued that the enlargement of the rate increase proceeding to include virtually all of AT&T's rates was as unnecessary as it was illegal. AIA further contended that, without prejudice to the Commission's apparent desire to hold a general proceeding on AT&T's overall rate structure, the validity of the particular increases AT&T had filed solely as a matter of "carrier initiative"⁸ could and should be determined on the basis of whether the carrier's justification for the increases (which did not include consideration of the levels of rates for its other services) met its statutory burden.

This attempt by AIA to get the increased rate proceedings moving in a manner which would make possible a decision in the relatively near future was summarily rejected by the Commission in an order released June 15, 1970 (see Appendix, *infra*), as were the objections of a number of other parties to incorporating issues to the rate level of the MTT and WATS services into the proceeding. The Commission has thus reiterated its intention to subordinate consideration of the validity of the several Telpak rate increases to the overall rate design questions in which it apparently has greater interest.⁹

⁷ *AT&T*, 21 F.C.C. 2d 495 (1970).

⁸ *AT&T* (J.A. 725, 727; 21 F.C.C. 2d 1, 2-3).

⁹ Amazingly, the Commission's most recent order directs that in considering the inter-service rate design questions, all evidence or consideration of the proper overall return for AT&T's interstate operations will be excluded from the consolidated proceeding and that it will fix "the relative earnings levels of the various services . . . within the framework of the going level of earnings as indicated by the most recent 12-month test period information

The unwillingness of the Commission to comply with the mandate of Section 204 of the Act with respect to the latest Telpak rate increase was well as the earlier one, is no *ex post facto* discovery by AIA. While some, though not all,¹⁰ of the above developments followed the filing of our review petition, the Commission's actions since November 1, 1969 are, as we pointed out in detail in our Opening Brief (pp. ~~00-00~~¹²⁻¹⁵), a natural outgrowth of its consistent misconception of the relationship of Sections 204 and 205 of the Act. Both at the time we filed our objections to permitting the new rate increase to become effective, and at the time we filed our petition for review in this Court, it was apparent that the Commission's previous failure to comply with Section 204 with respect to the first rate increase would be repeated with respect to the second.

AIA has never suggested that the filing of the new rate increase provided a belated opportunity for securing relief from the failure of the Commission to comply with the mandate of Section 204 with respect to the earlier increase. We do not now seek to have the initial rate increase set aside — even prospectively; but, surely, we were not compelled to sit idly by when the new increase was filed and it became apparent that a repetition of the violation was inevitable.

(Footnote 10 continued)

available in the record." (Appendix, *infra*, p. A-6). Thus, although the Commission has indicated (J.A. 572-573) that AT&T's interstate earnings in 1969 and 1970 under currently effective rates may well reach as high as 8.5%, and no return above 7.5% has ever been found to be just and reasonable by the Commission, the parties are precluded from arguing that any overall level of return AT&T may happen to earn in the test period is too high a bench mark for determining proper Telpak rates.

¹⁰ When AIA filed its Petition for Review on January 5, 1970, it was already clear that the hearing on the new rate increase could not start until well after the conclusion of the suspension period and would be only part of a broader proceeding covering most of AT&T's private-line rates. The examiner had by then scheduled the pre-hearing conference (jointly with two other proceedings) on January 8, 1970; and no evidence in support of the rate increases had been filed by AT&T.

II. The Relief Sought by the Petitioners is Appropriate in the Circumstances of this Case.

The carriers¹¹ (but not the Commission) take the position that, even assuming violation of the Act's directive for a priority hearing on the rate increases, Commission action to reject or order the deferral of the effectiveness of the new rate increase was not the proper remedy. To the extent these arguments rest on the Commission's lack of authority under Sections 4(i) and 303(r) of the Communications Act, they have been fully covered in AIA's Opening Brief (pp. ³¹⁻³⁷~~43-51~~). Here, we need only point out that what the carriers are saying is that under no circumstances does the Commission have the power to protect the interests of the users of their services if such protection requires procedures other than those expressly incorporated into Section 204 itself. Accordingly, the carriers contend, the only appropriate form of relief would be an action in the nature of mandamus to compel the Commission to provide an expedited hearing on the rate increases, and AIA is accused of bad faith in failing to follow this path. This contention simply ignores our basic contention that Sections 4(i) and 303(r) may empower the Commission in appropriate circumstances to dispense with the priority hearing required by Section 204, but that the claims of the carriers' customers cannot be ignored when the Commission exercises such power.

The Commission's order of July 29, 1969, prescribing certain procedural prerequisites for any new Telpak filing by AT&T, expressly warned the carriers that even if the procedural requirements were met, the Commission might exercise such authority as it had to order deferral of the effectiveness of any new rates. (18 F.C.C. 2d 761; J.A. 225). We discuss, *infra*, the Commission's failure to abide by the procedures it had only recently approved. See also our Opening Brief, pp. ^{17-19, 24-27}~~000-000~~. But even if the carriers had met the procedural prerequisites to a new rate filing, the Commission, in our view, would have

¹¹ AT&T Brief, Point II.B; Western Union Brief, Point I.B.

been obligated to exercise its authority to preclude the new increase from becoming effective if it was unwilling to give priority to consideration of the validity of the rate increases.

Of course, in so contending we do not suggest that the appropriate exercise of general Commission authority, and whether or not its actions or failure to act constitute an abuse of discretion, can be resolved without consideration of the factual context in which the issue arises. There may be factual situations in which the Commission could properly exercise its broad powers under Section 4(i) and 303(r) of the Act both to postpone a hearing on the validity of a proposed rate increase and to permit the increase to become effective prior to the initiation of the postponed hearing. But this is not one of them. The latest Telpak increase is admittedly not necessary to provide additional revenues to AT&T which, if deferred, could leave it in a deficit earnings position. On the contrary, as we demonstrated in our Opening Brief (pp. 29-31), in the absence of the offsetting reduction in the MTT and WATS services it agreed to make, AT&T would be earning well above what the Commission viewed as a reasonable level. Thus, Commission action to secure the deferral of the new rate increase, rather than offset filings, would have left AT&T in exactly the same revenue position as the one in which it now finds itself.

Nor was the new increase required to make the Telpak service compensatory — the *sole* question which the original Commission Telpak proceeding was reopened to consider. On the contrary, the data filed by AT&T with the new rates, in purported compliance with the Commission's order of July 29, 1969, showed clearly that, either on an incremental or fully distributed cost basis, the rates in effect as of the time of the new filing were fully compensatory. (J.A. 252).¹² And, according to AT&T's own figures and under all six of the possible methods of allocating costs between the various services, the proposed new

¹² We do not mean to suggest that the original Telpak rates were not also compensatory. We have never been given the opportunity we were promised to show they were.

rates, which the Commission allowed to become effective would, on a fully distributed cost basis, earn a *higher* return on net investment than the regular private-line telephone service against which Telpak allegedly discriminates. In fact, according to the AT&T study, the new Telpak rates would produce higher earning levels than the message toll (MTT) service under three of the six possible cost allocation methods (with one of the other resulting in a stand-off), including the method the carrier contends is the most reasonable method of allocating costs. And this study failed to reflect the \$150,000,000 negotiated reduction in MTT and WATS rates which went into effect on January 1, 1970, and which necessarily further enhanced the comparative earnings level of the Telpak service as contrasted with the MTT service. (*Ibid.*).

The Commission recognized that, in the light of these facts, it could not merely permit AT&T to raise the Telpak rates. The Commission's position appears to be that the decision both to file the new rate increases and to make offset filings as a method of preventing windfall profits, was AT&T's alone, and not the product of any previous agreement. (J.A. 725-726). The admitted *ex parte* staff discussions with AT&T, and the absence from the Commission's order of any analysis of the merits of the various alternative methods of preventing a windfall, would indicate to the contrary. But, even assuming there was no prejudicial advance agreement,¹³ in the circumstances described above, the

¹³ This Court's recent opinion in *Moss v. Civil Aeronautics Board*, Case No. 23,627, decided July 9, 1970, makes clear that an agency engaged in extensive informal private negotiations with an industry cannot utilize orders in suspension proceedings to decide substantive rate making questions through the device of setting forth in the order the type of new filing it would accept. We suggest that the Communications Commission's pattern of behaviour here is analogous. It advised the carrier *ex parte* that it would expect any Telpak rate increase to be offset by MTT reductions and, then, when the carrier "voluntarily" followed this lead, the Commission gave short shrift to the pleadings by the Telpak users that it exercise its discretion in another manner which would protect them as well as AT&T.

Commission could not properly have exercised its discretion except by rejection, or securing the deferral of, the new rate filing.¹⁴

III. The Failure to Comply with the Commission-Prescribed Procedures.

As we emphasized in our Opening Brief (pp. ^{17-19, 24-27}~~60, 60~~), the Commission's Memorandum Opinion and Order of July 29, 1969 (J.A. 214; 18 F.C.C. 2d 761), approved certain special procedures, in addition to those already provided in Part 63 of the Commission's Rules, which were to be complied with prior to any rate filing. However, when the petitioners contended that these procedures had not been met, the Commission, to the extent it responded at all, merely stated that such questions could be considered in the hearing it had ordered. (J.A. 461).¹⁵ AT&T now states (AT&T Brief, Point II.D) that, if it

¹⁴ The arbitrary nature of the Commission's action is well illustrated by its quite different treatment of a rate increase AT&T filed at approximately the same time for the Program Transmission Audio Service — another specialized sub-category of its private-line service. The new rates for the audio service would, according to AT&T figures, provide a substantially smaller return on net investment than the new Telpak rates under all six possible methods of cost allocation. (J.A. 252-253). However, when the broadcast industry complained about the new rates, the Commission, in an action it did not announce until the afternoon of the oral argument on the stay petitions in the present court proceeding (although it had been taken several days previously), asked AT&T to refrain from putting them into effect until July 1, 1970, pending further negotiations. FCC News Report No. 5732, January 30, 1970. AT&T agreed and the increase filing was deferred. Moreover, while the Commission has since held that the appropriate Telpak rate level cannot be determined except as part of a general consideration of all of AT&T's rates (see Appendix, *infra*, pp. A-6, A-8), the Commission staff has now concurred in a settlement of the issue as to the appropriate level for the Audio rates, which on an overall basis is substantially *lower* than that AT&T filed for, and would thus leave this service in a comparatively worse relationship to Telpak and the other services than that indicated in the AT&T study. See Order of Hearing Examiner Herbert Sharfman (FCC 70M-941) released in FCC Docket Nos. 16258 (Telpak) and 18684 (Program Transmission Services) on July 7, 1970.

¹⁵ The Commission's Brief suggests (pp. 34-35) that the only procedures it approved were those specifically enumerated in the Appendix to the Memorandum Opinion and Order as the "procedures [which] should be utilized: . . .". (J.A. 224-225; 18 F.C.C. 2d at 768-

(Cont'd)

had had an opportunity to do so "in a full evidentiary hearing," it could have demonstrated that it had complied with some of the agreed procedures from which it allegedly deviated. But, assuming that such a preliminary inquiry might have been an appropriate way to resolve these questions, the fact is that this was not the procedure followed by the Commission.

We think it significant that neither AT&T nor the Commission has even attempted to answer AIA's contention (Opening Brief, pp. ²⁵⁻²⁶~~80-80~~) that the July 29, 1969 order contemplated that an up-to-date fully distributed cost study would be made by AT&T prior to any new rate filing, and that this was not done. (The "new" fully distributed cost study filed was based on the 1967 data used for the earlier studies and failed to reflect, *inter alia*, the \$150,000,000 rate decrease AT&T had agreed to make as of January 1, 1970.) This is not, we stress, merely a technical omission. The Commission has reiterated the need for such studies. However, when AIA asked that an up-to-date study be presented with the carriers' direct case on April 1, 1970, AT&T responded it could not be completed until mid-August 1970, and the examiner promptly afforded it the time it requested to complete the study (which was almost a year after the rate filing with which the up-to-date study was due).

IV. The Commission Orders are Final and Reviewable.

The contention of the Commission and the carriers that the Commission's orders lack the requisite finality for review is, in reality, simply another reflection of their unwillingness to face up to the statutory scheme. There is no

(Footnote 15 continued)

769). This allows the Commission to argue that everything else in the "Statement" preceding this language or in the Commission's Order of July 29, 1969, can be ignored. This reading, which would give no context to the references to the "new studies" to be prepared or to the Commission's own gloss on the procedures it approved, is not only a patent misconstruction of the Commission's intent, but one which the Commission itself has never adopted. Its position, as noted above, is merely that while there may have been violations of the agreed procedures, the resolution of these questions could await the hearing on the merits of the increases.

doubt that the Commission's actions here involved finally deprive the petitioners of the relief they seek and that no action by the Commission or the courts at the end of the agency proceeding could retrospectively cure this situation. If petitioners eventually prevail in the long drawn-out hearing process upon which we are now embarked, and if the Commission orders full refunds, with appropriate interest,¹⁶ then, the out-of-pocket monetary losses stemming from the overcharges will be compensated for. But both the Commission (*AT&T*, 21 F.C.C. 2d 1, 10; J.A. 730) and *AT&T* (J.A. 708-711) have been frank enough to admit that such refunds would not fully protect the users against losses stemming from the interim effectiveness of the higher rates. Nor can damages, assuming, as is most doubtful, they would otherwise be available and provable, compensate for some of the other types of loss such as those stemming from the inability to plan communication system improvements during the long period of delay.

The Commission's assumption in its brief that users can be fully protected by its accounting order (FCC Brief, p. 25) is belied by its own order specifying a three-months' suspension, and by the plain language of the statute, which would not have authorized any suspension period had not Congress recognized the self-evident fact that an accounting order does not and cannot provide full relief. The pitiful efforts of the Commission and the carriers to distinguish the Federal Power and Maritime Commission cases cited in our Opening Brief (pp. 34-36, 43-44.) only highlight the insubstantiality of their finality contentions. Of course there are differences between the statutory schemes affecting the several agencies, but these distinctions are quite irrelevant to the issue whether final refusal to take available action to preclude a rate increase from becoming effective is

¹⁶ As we have pointed out in our Opening Brief (p. ²⁰60, n. 7), past Commission practice and present Commission refusal to commit itself, make the likelihood that it will order refunds with interest most doubtful.

reviewable action. Thus, the basis asserted in the *Mobile*¹⁷ and *Memphis*¹⁸ cases arising under the Natural Gas Act for rejecting the rate increase filings in question — the allegation that contract restrictions precluded the new rate filing — is not involved here. But the argument that litigation on the validity of the Commission's failure to reject the filings had to await final Commission action in the hearing it had ordered was the same.

CONCLUSION

As we noted at the outset, the Commission, because of other regulatory activities it was engaged in, found it expedient to deviate — by withholding the prompt and expedited hearing otherwise required — from the “legislative compromise” establishing the appropriate procedures for processing disputed rate increases which is embodied in Section 204 of the Communications Act. The questions presented by this case are whether, in the circumstances, the Commission possessed the power to prevent the Telpak rate increases from becoming effective and whether its failure to do so was inconsistent with the Act. For the reasons stated above and in AIA's Opening Brief, we believe both of these questions must be answered affirmatively.

Accordingly, AIA believes this Court should direct the Commission to order AT&T to put into effect, pending the final Commission decision in the Telpak rate increase proceeding, the Telpak rates which were in effect prior to February 1, 1970, and that AT&T should make immediate refunds to Telpak

¹⁷ *Mobile Gas Service Corp. v. FPC*, 215 F.2d 883 (3rd Cir. 1954), *affirmed, sub nom.*, 350 U.S. 332 (1956).

¹⁸ *Memphis Light, Gas and Water Division v. FPC*, 102 U.S. App. D. C. 77, 250 F.2d 402 (1957), *reversed on other grounds, sub nom.*, 358 U.S. 103 (1958).

users of the difference between what they would have owed under such rates and what they actually paid under the rates illegally in effect.²⁰

Respectfully submitted,

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July 27, 1970

¹⁹ Since AT&T was fully aware of the pendency of the instant review proceedings when it put the new rates into effect on February 1, 1970, it cannot now complain that any relief to which the Telpak users would otherwise be entitled should be withheld because, as a result of the offset filings it had voluntarily made, AT&T might suffer diminution in revenues for the period between February 1, 1970 and the Courts' decision. Any contention that there was no option to defer the increase since Section 204, in terms, states that a rate increase "shall" become effective at the end of suspension period is specious: The experience with the audio rate increase detailed in footnote 15, *supra*, indicates that scheduled rate charges can be, and frequently are, postponed by agreement between the carrier and the Commission. Moreover, the Commission had already agreed that the offset reductions could be withdrawn if the Telpak increases were approved.

APPENDIX

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 70-618
49061

In the Matter of)	
AMERICAN TELEPHONE & TELEGRAPH COMPANY AND)	DOCKET NO. 16258
THE ASSOCIATED BELL SYSTEM COMPANIES)	
Charges for Interstate and Foreign)	
Communication Service)	
AMERICAN TELEPHONE & TELEGRAPH COMPANY LONG)	DOCKET NO. 18128
LINES DEPARTMENT)	
Revisions of Tariff F.C.C. No. 260,)	
Private Line Services, Series 5000)	
(Telpak))	
AMERICAN TELEPHONE & TELEGRAPH COMPANY)	DOCKET NO. 18684
Revision of American Telephone & Tele-)	
graph Co. Tariff F.C.C. No. 260,)	
Series 6000 and 7000 Channels)	
(Program Transmission Services))	
AMERICAN TELEPHONE & TELEGRAPH COMPANY)	DOCKET NO. 18718
Revision of American Telephone &)	
Telegraph Co. Tariff F.C.C. No. 133,)	
Teletypewriter Exchange Service)	

MEMORANDUM OPINION AND ORDER

Adopted: June 10, 1970 Released: June 15, 1970

BY THE COMMISSION: Commissioners Burch, Chairman; and Cox absent;
Commissioner Johnson concurring in the result.

1. The Commission has before it several petitions for reconsideration, and other petitions and motions addressed to our Memorandum Opinion and Order of February 18, 1970 in the above referenced proceedings, (21 F.C.C. 2d 495). These pleadings are listed on the attachment hereto. Before discussing the contentions made in the various pleadings, and our disposition thereof, we believe that it will be helpful to review again the actions taken by the Commission prior to the one complained of herein.

2. In 1965 we initiated the above-captioned Docket 16258 general investigation into the Bell System rates and rate structures in part because a fully distributed seven-way cost study made by the Bell System revealed a wide disparity in the levels of earnings among the various classes of interstate service, (2F.C.C. 2d 871). We were concerned that the basic message toll telephone (MTT) classification of service and the closely related Wide Area Telephone Service (WATS), for which there are no directly competitive services and for which the earnings level were relatively high, should not be burdened by, or required to subsidize the so-called competitive services for which the earnings level were relatively low. We were also concerned that

whatever methods were employed to price message toll and other services, they should accord with sound ratemaking practice and statutory requirements. In the past, the total interstate revenue requirements for the Bell System have been determined on the basis of the net historical investment for the totality of interstate services. Moreover, prior to the initiation of the proceeding in Docket No. 16258, we had regarded an allocation of net historical investment as the principal, if not controlling, basis to determine revenue requirements and rate levels for a particular class of service, with relative use being the significant measure of such allocation, 18 F.C.C. 2d 762-763 (1969). This was the method used by the Bell System in making the aforementioned seven-way cost study that preceded the institution of the Docket No. 16258 investigation, with the significant difference that, for the first time, the totality of AT&T's interstate net historical investment was allocated among AT&T's major interstate services. However, at the time we instituted this investigation, we recognized that there was a need to examine different or alternative methods of determining the appropriate rate levels for individual classes of service.

3. On December 22, 1965, we delineated the procedures to be followed in Docket No. 16258 and, in view of the results of the aforementioned cost study showing wide disparity in rate levels among the classes of service, we stated that it would serve the public interest for AT&T to effectuate any rate adjustments that might be necessary as promptly as possible in the light of the aforementioned study results and the ratemaking principles and factors advocated by AT&T, 2 F.C.C. 2d 142 (1968). Thereafter, AT&T filed revised tariff schedules providing for substantial increases in rates for (1) private line telephone and telegraph services, including Telpak, (2) private line program transmission services, including both audio and video, and (3) TWX service. All of these tariff revisions were supported by claims by AT&T that they were justified by cost studies and by the ratemaking principles and factors advocated by AT&T. By a series of orders in three separate dockets, we instituted separate investigations into all of these tariff revisions. Docket No. 18128 was assigned to the hearing on the private line telephone and telegraph service rate changes, including Telpak. (See F.C.C. 68-756, April 10, 1968; 13 F.C.C. 2d 853, July 10, 1968; F.C.C. 68-756, July 24, 1968; and 20 F.C.C. 2d 383, October 29, 1969.) Docket No. 18684 was assigned to the hearing on the rate changes for private line program transmission services. (See F.C.C. 69-1038, September 24, 1969; F.C.C. 69-1197, October 29, 1969.) Docket No. 18718 was assigned to the increases in TWX service (F.C.C. 69-1198, October 29, 1969.)

4. Each of the aforementioned separate proceedings concerning the lawfulness of the revised tariffs for private line telephone and telegraph (including Telpak), private line program transmission, and TWX were instituted with the understanding that the determination of the proper level of earnings for each class would be governed by ratemaking principles and factors established in the proceedings in Docket No. 16258. We divided Docket No. 16258 into different phases and, in Phase I-B thereof, we undertook an intensive investigation into the issue of the appropriate

ratemaking principles and factors which should govern the relationship among the rate levels for each of the principal categories of service of the Bell Systems, 5 F.C.C. 2d 844, 1966. Approximately 100 days of hearings were held between October 9, 1967 and February 14, 1969 on the Phase I-B issues. All direct testimony was completed and all cross-examination thereon was also completed except for that part of the direct cases relating to certain fully distributed cost studies made by the Bell System. In these Phase I-B hearings the economics of pricing were explored in detail. Numerous expert witnesses testified. A variety of differing opinion testimony was adduced on the record. For example, the Bell System witnesses and others attacked the use of fully distributed costs for ratemaking purposes and urged the use of other costs, such as

full additional costs, or long range incremental costs, for such purposes. Others suggested that "public interest considerations" could be used to justify certain rate levels. Differing views were expressed by the experts as to whether or not a burden on message toll service would occur under the various alternative principles advocated by the Bell System and others and doubt was expressed by some as to the reliability of techniques to determine with any degree of accuracy the incremental costs in a system as complex as the telephone industry.

5. Principally because of the wide-ranging differences of opinion and opposing viewpoints of expert witnesses that emerged in the course of the aforementioned Phase I-B hearings, the Telephone Committee, on February 18, 1969 (F.C.C. 69 M-197) released an order providing for off-the-record conferences, open to all of the parties, to explore the possibility of reaching an agreed statement of ratemaking principles and factors that would obviate the necessity for further formal proceedings in Phase I-B. After a series of such informal conferences, the parties arrived at such a statement and, on May 28, 1969, introduced the statement into the record of the proceedings in Phase I-B. This statement is a declaration of general principles and accompanying procedures which were designed to be applied in the context of specific rate issues. The full text of this statement appears at 18 F.C.C. 2d, 765-769.

6. By Memorandum Opinion and Order of July 29, 1969, we carefully considered the aforesaid statement of ratemaking principles and factors and formally approved all of the procedures recommended therein (except the recommendation dealing with the Telpak Sharing case), 18 F.C.C. 2d 761. We ruled that further proceedings in Docket 16258 would be subject to further order, that the record in Phase I-B would be incorporated into the proceedings herein in Docket 18128, and that the then pending TWX case in Docket 15011 would be severed from 16258 and decided separately. (The TWX rate case in Docket No. 15011 was decided September 17, 1969, 19 F.C.C. 2d 711.) We stated among other things, that we had accumulated, in Phase I-B, a massive record of unprecedented scope in

which the economics of pricing was explored in detail; that the agreed upon statement of ratemaking principles and factors properly recognizes the relevance of both fully distributed (f.d.c.) and long run incremental costs (l.r.i.c.) in considering appropriate rate levels of specific classes of service and that studies of both would be submitted for consideration by the Commission; that we had not drawn any conclusion as to what weight, if any, should be accorded to either or both of these costs in fixing rates for a specific service; and that we now have a sound basis upon which to determine theoretical ratemaking principles which can be tested and applied in the context of ratemaking proceedings dealing with AT&T's rate structure and the prices to be charged for specific services.

7. One of the procedures recommended in the aforementioned statement and approved by the Commission, was that the Chief of the Common Carrier Bureau would recommend termination of Phase I-B following the filing of new studies by the telephone companies and proposed rate adjustments and the institution of or continuation of separate rate proceedings. Following our action of July 29, 1969, the Chief of the Common Carrier Bureau, pursuant to the agreed procedures, advised the Commission that AT&T had filed new studies and had made rate adjustments in private line/Telpak, program transmission, TWX, MTT and WATS, which AT&T alleged were in compliance with the statement of ratemaking principles and factors, and that the pending proceedings in Dockets 18128 (Private Line/Telpak), 18684 (Program Transmission) and 18718 would determine whether they in fact comply. Accordingly, the Bureau Chief recommended termination of Phase I-B.

8. On February 18, 1970, we adopted the Memorandum Opinion and Order that is the subject of the pleadings identified in the attachment hereto. The order in question terminated Phase I-B, incorporated the record of Phase I-B into Docket 18684 (Program transmission) and Docket 18178 (TWX) as had been done earlier in Docket 18128 (Private line/Telpak). Further, it added to the existing issues in Docket No. 18128 (Private Line/Telpak), Docket 18684 (Program Transmission), and Docket No. 18718 (TWX) the issue as to whether the rate levels for Message Toll (MTT) and WATS are lawful. Issues as to the rate levels for the other classes of service, that is, private line, Telpak, Program Transmission and TWX, had already been specified in prior orders. We further stated that there was a need for a new issue as to the rate level for each of AT&T's principal services, including MTT and WATS, so that the Commission could be in the position of ordering the elimination of the causes of any inter-service burden found to exist. 21 F.C.C. 2d 497. We also noted that allocation of total interstate test period historical book costs of AT&T among all of the service categories may be useful in determining whether, during the test period, any service has burdened any other service.

9. The various petitions objecting to our action of February 18, 1970 were aimed at four main points. First, it was stated by several parties that the inclusion of issues as to the appropriate rate level

for each of AT&T's major categories of services will unduly complicate each of the three proceedings herein (private line/Telpak, program transmission and TWX) and, according to AT&T, require extensive evidence on the proper overall rate of return for its total interstate operations. In this respect, the American Broadcasting Companies, Inc., Columbia Broadcasting System, Inc., and the National Broadcasting Company, Inc. (hereafter broadcasters) stated that the result of broadening the issues in this manner will be three separate proceedings with identical issues on the appropriate rate levels for all classes of service, requiring all of the parties to any one of the three separate dockets to participate in the remaining dockets. AT&T and Western Union (WU) contend that it is not necessary to include issues as to the rate level for all classes of service in each of the three proceedings since they allege that, once an appropriate rate level has been found in a particular proceeding dealing with the rate level of a particular class of service, further formal or informal procedures could be instituted to implement any needed adjustments in the rate level of any other class of service. Second, various parties objected to the references we made to historical costs in our order and allege that such reference is indicative of the fact that we have prejudged the acceptability of such costs over other costs, such as l.r.i.c., which may be introduced into the record. Third, objection is made to our incorporating by reference the Phase I-B record into Docket Nos. 18684 (program transmission) and 18718 (TWX). The basis for the objection, as stated, was that only specific portions of that record would be relevant to each of the two separate proceedings and to incorporate the whole record would not only be unwieldy but would also violate the Commission's Rules. Fourth, question is raised as to the omission of any reference specifically to Telpak in the fourth ordering clause of our order in which we added the new issue as to the lawfulness of rate levels of the various categories of service.

10. In addition to the points just mentioned, Aerospace Industries Association of America, Inc. (AIA) requested that the issue as to the lawfulness of Telpak rates and the Telpak rate level be separated from the remainder of Docket No. 18128 and determined on an expedited basis. AIA argued that such action is required by Section 204 of the Communications Act. It also requested that the Commission hold oral argument so that any further procedures to be adopted in Docket Nos. 18128, 18684, and 18718 could be discussed. Finally, Air Transport Association of America, United Air Lines, Inc., Eastern Air Lines, Inc. and Emery Air Freight Corporation (Airline Parties) commented adversely on the fact that the Chief of the Common Carrier Bureau recommended to the Commission that Phase I-B be terminated without providing opportunity to the parties to comment on the recommendation.

11. We have considered all of the arguments posed by the parties and have concluded that we should (1) clarify our order of February 18,

1970 but retain therein the issue we added therein with respect to the rate levels for MTT and WATS and that we should (2) consolidate into one proceeding, the proceedings in Dockets 18128 (private line) and 18684 (program transmission), leaving Docket 18718 as a separate proceeding.

12. With respect to our decision to retain the issue as to the rate levels of MTT and WATS, we should make it abundantly clear that we do not consider that this issue involves the determination of a proper overall level of earnings or a fair rate of return for the Bell System on interstate operations. The purpose of the issue is simply to enable adjustments to be made in the relative earnings levels of the various services should such adjustments be indicated by the record herein. Any such adjustments would be made within the framework of the going level of earnings as indicated by the most recent 12-month test period information available in the record.

Thus, the purpose of any such adjustments that may be made in this proceeding would not be to change the overall level of earnings but rather to effectuate a proper relationship among the several classes of service and the issue we are retaining herein as to the reasonableness of the overall rate levels of MTT and WATS is to be considered in this limited context.

13. With respect to our conclusion to consolidate the proceedings in Docket 18128 (private Line/Telpak) with Docket 18684 (program transmission), we are doing so primarily because all of the services involved in these two dockets are sub-classifications within the family of private line services governed by AT&T's private Tariff F.C.C. No. 260. We believe there will be certain questions of fact and law common to all of the services that can better be handled in a consolidated proceeding. Moreover, many of the parties in each of these two proceedings are also parties in the other. Consolidation will be a convenience to such parties. The same considerations do not obtain to the same degree in the TWX proceeding. TWX service is not furnished over private line facilities and it is governed by a separate tariff, AT&T's Tariff 133. It is a switched service provided for the most part over facilities dedicated exclusively to the TWX service, and the parties in interest in the TWX case are generally different from those in the other two proceedings. Although we believe it best to maintain a separate proceeding for TWX, we recognize that there will be certain questions, particularly in the area of costs and ratemaking principles and factors that may be common to TWX and the private line services, and we urge the Hearing Examiners and the parties in the two proceedings to utilize such cooperative procedures as may be desirable in developing an adequate hearing record in both proceedings without duplication of time and effort in those areas that involve common questions.

14. We believe that the action we are taking herein disposes of the principal objections to our Memorandum Opinion and Order of February 18, 1970. Our action should make it clear, if it was not already clear, that neither AT&T nor any other party would be expected to introduce evidence as to the appropriate overall rate of return for the Bell System. The reasonableness of the overall rate of return of the Bell System for its total interstate operations will not be in issue and evidence thereon should not be admitted. As we state in paragraph 12 hereof, the Commission will take the going level of earnings on the Bell Systems' total interstate business in resolving the question herein concerning the propriety of the level of earnings and rate structure for each of the categories of service in issue, and for such purpose, we will accept the operating results for the latest available 12-month period.

15. One point raised by the petitions is whether we have prejudged the issue as to what type of costs will be used for determining the lawfulness of existing rate levels and rate structures. The Airline Parties, among others, point to paragraph 4 of our order as being indicative of prejudgment in favor of historical costs. Our reference to historical costs in that paragraph was taken from the statement on ratemaking principles and factors agreed to by the parties. It was used as illustrative of a principle encompassed by the stipulation of the parties in Docket No. 16258 which, if approved by the Commission and applied in the instant proceedings, could demonstrate that one of AT&T's services is being burdened by another service of AT&T. In light of this, it is necessary to view the totality of costs for all of AT&T's interstate services so that the question of any inter-service burden can be examined and if necessary be corrected by the Commission. We have not determined that such costs are the proper indication of such burden. We will consider any and all demonstrations of cost that can be used to determine whether such burden does or does not exist.

16. As we have heretofore held, the services furnished under the Telpak rates and those furnished under the ordinary private line rates are like communication services, that the Telpak rates are nothing more than different rates for ordinary private line services, and that Telpak is merely a rate classification within the family of

private line services, 38 F.C.C. 395 (1964), 9 F.C.C. 2d 149 (1967), 13 F.C.C. 2d 857 (1958). We did not specifically name Telpak as a separate class of service in our ordering clause relating to levels of rates for the principal categories of service since it is clearly encompassed within the ordinary private line services which were named in the ordering clause. Moreover, the issues originally specified in Docket 18128 had already put in issue the propriety of the Telpak rate level as a rate classification within the private line services as well as the propriety of the internal Telpak rate structure. Accordingly, we see no need to amend our order to refer specifically to the rate level for Telpak.

17. We do not agree with AIA's allegation that Section 204 of the Communications Act requires that the lawfulness of the increased Telpak rates be determined separately and before resolution of the other matters in issue herein. Since the Telpak rates are an integral part of the rate structure within the private line services, we do not believe that we can properly determine the appropriate rate level or rate structure for Telpak in isolation from or without regard to the relationship of the Telpak rates to the non-Telpak rates for like services. In our judgment, Section 204 does not require that we attempt to do so. (See 47 USC 154(i) and 154(j)). AIA requests oral argument before the Commission, but we see no need therefor in view of our action herein.

18. In view of our decision to consolidate the two private line proceedings, and our clarification of the rate level issue as to MTT and WATS, we believe that the objection to incorporating the record of Phase 1-B into these separate proceedings is largely mooted. In any event, we see no need to amend our order in this respect. Finally, we do not understand the comment made by the Airline Parties that the Chief of the Common Carrier Bureau acted improperly in recommending termination of Phase 1-B without giving the parties a prior opportunity to comment. The agreed procedures in the Statement of Ratemaking Principles and Factors stated:

Following the filing of the new studies and proposed rate adjustments by respondents and the institution of any separate proceedings (see par. 4), the Chief of the Common Carrier Bureau will recommend that phase 1-B of Docket No. 16258 be terminated without opinion on the merits by the Commission. 18 F.C.C. 2d 768.

The procedure followed is in direct compliance with that agreed to by the parties to the Statement and was otherwise proper.

19. Accordingly, IT IS ORDERED, That Docket Nos. 18128 and 18684 are hereby consolidated for hearing, and that a single hearing examiner shall be designated to preside at the consolidated hearing and that he shall certify the record, without preparation of an initial or recommended decision, and the Chief of the Common Carrier Bureau shall thereafter issue a recommended decision which shall be subject to the submittal of exceptions and requests for oral argument and thereafter the Commission shall issue its final decision.

20. IT IS FURTHER ORDERED, That the petitions and motions contained in the attachment hereto are hereby GRANTED to the extent indicated in the foregoing and DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

Attachment

A P P E N D I X

1. "Petition for Reconsideration" filed by the American Broadcasting Companies, Inc., Columbia Broadcasting System, Inc., and National Broadcasting Company, Inc. on March 12, 1970.
2. "Petition for Reconsideration of Order Released February 24, 1970" filed by the Air Transport Association of America, United Air Lines, Inc., Eastern Air Lines, Inc., and Emery Air Freight Corporation on March 10, 1970.
3. "Motion to Delete Issues" filed by the Bell System Respondents on March 16, 1970.
4. "Comments of Aeronautical Radio, Inc." filed on March 13, 1970.
5. "Petition for Reconsideration and Severence" filed by the Aerospace Industries Association of America, Inc. on March 17, 1970.
6. "Opposition to Petition for Reconsideration" filed by The Western Union Telegraph Company on March 19, 1970.
7. "Statement of the National Association of Motor Bus Owners" filed March 19, 1970.
8. "Statement of Position with Respect to Issues in Docket No. 18128" filed by the American Newspaper Publishers Association, The Associated Press, Twin Coast Newspapers, Inc., and McGraw-Hill, Inc. on March 19, 1970.
9. "Comments of The Western Union Telegraph Company on Petitions and Motions Pertaining to Memorandum Opinion and Order Released February 24, 1970" filed on March 26, 1970.
10. "Motion for Oral Argument on Pending Petitions" filed by Aerospace Industries Association of America, Inc. on March 19, 1970.
11. "Response to Western Union Opposition to Oral Argument" filed by Aerospace Industries Association of America, Inc. on April 2, 1970.



REPLY BRIEF FOR THE AIRLINE INDUSTRY PETITIONERS:
AIR TRANSPORT ASSOCIATION OF AMERICA,
UNITED AIR LINES, INC.,
EASTERN AIR LINES, INC.,
EMERY AIR FREIGHT CORPORATION, and
AERONAUTICAL RADIO, INC.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,839

AIR TRANSPORT ASSOCIATION OF AMERICA, et al., Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA, Respondents.
AMERICAN TELEPHONE AND TELEGRAPH COMPANY and
THE WESTERN UNION TELEGRAPH COMPANY, Intervenors.

No. 23,842

AERONAUTICAL RADIO, INC. Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA, Respondents.
AMERICAN TELEPHONE AND TELEGRAPH COMPANY and
THE WESTERN UNION TELEGRAPH COMPANY, Intervenors.

(Consolidated with Case Nos. 23,833, 23,836, 23,481 and 23,843)

Petitions to Review Orders of the
Federal Communications Commission

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Petitions to Review Orders of the
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REPLY BRIEF FOR THE AIRLINE INDUSTRY PETITIONERS:
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UNITED AIR LINES, INC.
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EMERY AIR FREIGHT CORPORATION, and
AERONAUTICAL RADIO, INC.

(Petitioners in Nos. 23,839 and 23,842)

SCOPE

The purpose of this reply brief is not to repeat the points made or authorities considered in our original brief.

Instead, this brief will be limited to an analysis of the thrust of the reliance of opposition briefs with a view to demonstrating the fallacies inherent therein.

THRUST OF OPPOSITION BRIEFS IN GENERAL

First, with respect to the power of Commission to reject the second Telpak rate increase in question under the circumstances here involved, all of the opposition (the Commission, AT&T, and Western Union) now seem to rely much more on the width of the Commission's discretion than on the narrowness of its power. While AT&T reserves a denial of the Commission's rate increase rejection power in a place or two,^{1/} it does not now seem to press or argue the point, as it did in opposition to the motion for stay.^{2/} While the Commission continues to rely upon its own broad discretion, it is still fuzzy, and perhaps understandably so, about its rejection power in the premises. Similarly Western Union talks more about the impropriety of rejection here than it does about impropriety in any event, although it does attempt to distinguish other agency cases involving rate increase rejection.^{3/} The net here would seem to be that the power of the Commission to reject in the abstract or in any event, is not now too seriously questioned, but instead,

^{1/} See AT&T Br., pp. 17, 21-24.

^{2/} Memorandum of AT&T in Opposition to Petitioners' Motion for Stay, pp. 39-49.

^{3/} WU Br., pp. 39-48.

only as applied to the facts in the present case.^{4/}

Passing, then, to the more important factual side, the one thing the opposition briefs have completely in common is a clear misunderstanding or misinterpretation of the key order of the Commission, namely, the Commission's order of April 10, 1968, suspending the first round of Telpak rate increases until September 1, 1968.^{5/} The common fallacies here involved will be the subject of separate treatment herein.

Another important error in common lies in the opposition's attempt to explain away the Commission's undeniable failure to observe the express mandate of Section 204 of the Act for expedited and preferential hearing of the September 1, 1968, Telpak rate increases. This will also be further developed.

The opposition's treatment of the "prejudgment" issue is probably the most revealing of all, and especially the treatment afforded by Western Union, both directly and indirectly. As we shall see, the Commission and AT&T are a little more subtle and circumspect,^{6/} but Western Union makes no bones about asking the Court to accept, as a factual basis for sustaining the Commission here,^{7/} the self-same allegations which are relied upon to show predilection and apparent prejudgment, namely, the underlying unadjudicated charges of Western Union with respect to Telpak C and D which Commissioner Cox apparently accepted in his dissent on Telpak C and D in the original Telpak Case and which were the apparent predicates of his action, and of Commissioner

^{4/} If by chance we have misinterpreted the position of any opposition party in this regard, it will, of course, have the opportunity to correct any such misinterpretation.

^{5/} FCC 68-388, 33 Fed. Reg. 5900 (1968), JA p. 170.

^{6/} FCC Br., pp. 40-42; AT&T Br., pp. 33-36.

^{7/} WU Br., pp. 36-39.

Johnson, in voting against anything more than a one-day suspension of the second Telpak C and D rate increases which went into effect on February 1, 1970.

At least one other related feature deserves advance mention, before more detailed reply to more specific arguments. Both the Commission and AT&T seem to skate around the question of the relevance of no overall "return" need by AT&T for increased earnings from Telpak.^{8/} They seem to rest on the Commission's subsequent disclaimer of any connection between the admittedly "offsetting" rate increases of the same amount (\$87,000,000) in certain classes of service (principally Telpak) with like rate decreases in interstate long distance message toll and WATS.^{9/} But here, again, Western Union steps forward and says in effect that since there obviously was no need for increased earnings (in view of the concurrently negotiated reduction of \$150,000,000 in overall earnings in the form of decreased message toll rates), the purpose of the second Telpak rate increase (and conversely, of the offsetting message toll and WATS reduction) had to be a rate level and rate relationship adjustment, as between Telpak, and message toll and WATS,^{10/} the very questions in controversy in incompleted hearings and undetermined litigation since the original remand of the compensatory character of the original Telpak C and D rates. With the atmosphere thus cleared, the responsibility and duty of the Commission, in fairness to all pendente lite, not to prejudge and not to impose or permit any unnecessary burdens on anyone, beyond those imposed by the increased rates of September 1, 1968, should become clearer and clearer.

^{8/} FCC Br., pp. 41-42; AT&T Br., p. 34.

^{9/} Ibid. Cf. FCC 70-75, 21 F.C.C. 2d 1 (1970), JA p. 724.

^{10/} WU Br., p. 36.

REPLY ARGUMENT

I. The Commission and Its Defenders Have Completely Misconstrued the Commission's Key Order of April 10, 1968, Suspending the First Round of Telpak Rate Increases

If there is one song the opposition briefs are "in tune" on it is their "notice and warning" argument,^{11/} the chorus of which is, in effect, how grateful the Telpak users should be to benevolent "Ma Bell" for warning of her 100% plus Telpak C and D rate increase as early as January, 1967, and for not putting the whole increase into effect as early as September 1, 1968. Incidentally, as applied to the airline industry alone, the first bite amounted to \$11,000,000 a year, and the second bite to \$17,000,000 for a total 108% increase.^{12/}

This opposition argument would be ignored but for the seriousness with which it is urged. While the argument may have some superficial psychological appeal, there is no semblance of substance or legal significance to it, once the relevant facts are noted and understood.

Interestingly enough, while there may be some differences in emphasis on other background material, both sides to this controversy rely primarily upon the same order, namely, the Commission's order of April 10, 1968. It is the key to their position, as well as ours, and accordingly requires close scrutiny. In such scrutiny, we respectfully suggest that the Court follow closely and accept the background facts recited by the Commission, as distinguished from our interpretation or that of our opponents.

First, with respect to what the Commission then had before it, the first paragraph of its order^{13/} said:

^{11/} FCC Br., pp. 29-30; AT&T Br., pp. 6, 8, 18, 27-28; WU Br., pp. 7-8, 16-20.

^{12/} Petitioners' Brief, p. 11. During the last year and one-half, the airlines have received rate increases aggregating approximately 11%, because of a serious profit squeeze resulting in a return of only about 4% and an urgent need for additional revenues. This is a far cry indeed from the order of magnitude of the Telpak rate increases here involved by AT&T at a time when it was under active surveillance to prevent continuation of excessive earnings.

^{13/} FCC 68-388, 33 Fed. Reg. 5900 (1968) JA p. 170 (Emphasis added).

"1. The Commission has before it revised tariff schedules filed by American Telephone and Telegraph Company on March 25, 1968, under its Transmittal No. 10069, which would effectuate substantial increases in TELPAK rates, For its justification of such substantial increases, A.T.&T. relies specifically on the material which has been received in the record in Docket No. 16258, where the question of the proper overall level of earnings for TELPAK and, concomitantly, whether the present level of rates is compensatory, are at issue."

Next, as to what had been decided and not decided in the original

Telpak case, the second paragraph of the Commission order recited:

"The justification of competitive necessity was found not to be applicable to the A and B classifications, since it would not be practical for a customer to construct his own microwave system if his need was limited to the number of channels encompassed by these classifications. The Commission found, however, that there was apparent competitive necessity for the C and D classifications which encompassed larger capacities, but required a further showing on the question of whether the existing rates for such classifications were compensatory. In accordance with our decision in the original TELPAK case, TELPAK A and B were cancelled. Upon such cancellation, the proceeding was terminated and the question as to whether TELPAK C and D were compensatory was placed at issue in Docket No. 16258.

Then, in paragraph 3, the order recited the incomplete state of the record on the remanded and unresolved issues of the compensatory character of the original Telpak C and D rates:

"3. The Commission is cognizant of the fact that the record in Docket No. 16258 is not complete as regards TELPAK C and D, since A.T.&T.'s evidence has not yet been fully examined, and the users of service under the TELPAK tariff, a number of whom are parties intervenor to the proceeding, have not as yet had the opportunity to put on their cases in opposition. Presumably, such intervenors will seek to establish that the present rates are in fact compensatory, and that competitive necessity requires their maintenance at the present level. Moreover, we are cognizant of our conclusion in the original TELPAK case that the TELPAK C and D rates were apparently justified by competitive necessity, provided, however, that they be shown to be compensatory."

The Commission then recited its inability to determine that the

proposed rates would be just and reasonable or otherwise lawful (par. 4), its decision to suspend (par. 5), its deferment of action on certain procedural pleadings (par. 6), and on the question of an accounting (par. 7).

Finally, and most importantly, in paragraph 8, the Commission said:

"8. We are suspending the proposed tariff schedules to the full extent of our statutory authority on the basis of the considerations recited above. This means that the schedules will become effective September 1, 1968. Moreover, it should clearly be understood by the TELPAK users, that, IN THE EVENT A COMPLETE HEARING RECORD INDICATES THAT INCREASES IN THE LEVEL OF TELPAK RATES ARE JUSTIFIED OR REQUIRED, or that the TELPAK classification should be eliminated, any increases occasioned thereby will become effective without delay. The users should henceforth govern themselves accordingly, and their communications budgets should be prepared with this contingency in mind. In this connection, users have been on notice since 1961 that TELPAK rates presented substantial questions of lawfulness requiring formal investigation and that significant increases in these rates could result."

To complete this factual picture, reference should probably also be made to the Commission's supplemental order of July 10, 1968, in which it passed on the procedural matters previously deferred, and said:^{14/}

"It is our expectation that UPON COMPLETION OF THE RECORD in Phase I-B in these respects, the Commission will be in a position to prescribe appropriate principles or guidelines for the determination of the over-all revenue objectives that are to be met by Respondents in the design of each of their principal rate classifications. It is also our intention to determine the extent to which each of the existing or proposed rate classifications accord with, or fall short of, meeting those principles and guidelines.

"Thus, with respect to Respondents' rates for TELPAK service, including those now under suspension and investigation in Docket No. 18128, we will determine in Phase I-B of Docket No. 16258 whether competitive or other valid considerations justify the pricing discrimination existing in the TELPAK offering; and, if so, whether Respondents' existing or proposed rates for TELPAK will make an appropriate contribution to Respondents' total interstate revenue requirements. THESE DETERMINATIONS with respect to the revenue objectives appropriate to TELPAK and other services are, in our opinion, of

^{14/} FCC 68-711, 13 F.C.C. 2d 853, 856 (1968), JA p. 180 (Emphasis added).

THRESHOLD ESSENTIALITY to a determination of the reasonableness and lawfulness of the specific rates and rate relationships within the individual rate structures. It is also our opinion that we can arrive at these threshold determinations without simultaneously resolving all other questions."

Now, returning to paragraph 8 of the Commission's order of April 10, 1968, what did the Commission mean when it said that Telpak users might conceivably be faced with even higher rates "in the event a complete hearing record indicates that increases in the level of Telpak rates are justified or required"? Did it mean what it said, in plain language, after Commission "determinations" on a "completed" record, or did it mean something else? Did it mean, as our opposition would now contend, that without completion of the hearing record and without any determination of any of the unresolved "threshold" issues recited in the orders of April 10 and July 10, 1968, the Commission would probably permit AT&T to put into effect the second half of its threatened increase, and that if questioned, the carrier and the Commission could for their justification then "pick and choose" alleged support from an incomplete record on unresolved issues? Is that what the Telpak users were supposed to have understood from these orders? Is that the warning they had and the reason they should have appealed then, ^{15/} rather than wait for the subsequent failure to reject the second round of rate increases? This is what our opponents would apparently have you believe. We respectfully submit that the answer to such questions must be a resounding negative.

But, still straining to maintain an impossible position, our opponents have intimated ^{16/} and will no doubt argue, that there is one other Commission order which should be considered before this book is closed, namely, the

^{15/} See FCC Br., pp. 29-31; AT&T Br., pp. 18, 27-28, 29; WU Br., pp. 16-20, 30-32.

^{16/} FCC Br., pp. 34-36; AT&T Br., pp. 27, 36-40; WU Br., pp. 18-19, 48-52.

Commission's order of July 29, 1969, on the "Statement or Rate-Making Principles and Factors" tendered to it by the parties to Phase I-B of Docket

^{17/} 16258. While there is nothing in this order or the agreed "Statement" to change the underlying situation, we quite agree that it should be considered. The Commission simply "noted" the Stipulation (without necessarily approving it) and "approved" the recommended procedures, except in one particular not here relevant.^{18/}

As pointed out by Commissioner Johnson in his dissent, the agreed upon but non-approved principles decided nothing of any consequence. In his own picturesque way, the Commissioner summarized the result as follows:^{19/}

"The public interest is not served by now refusing to confront and resolve the difficult issues raised in this four-year-old proceeding.

"* * * Unless the Commission intends to retire from the field of contention altogether, allowing Bell to price in any manner the company finds in its interest, these issues and their attendant differences will have to be resolved. The 'agreement' limits none of these differences, nor does it limit any of the positions the parties may assert in future proceedings.

"Third, the difficulties with the 'agreement' illustrate that in fact there is no 'agreement.' Rather there is:

--a summary of the contending positions

--acknowledgment that any, all, or none of the viewpoints may or may not be relevant to any particular ratemaking process

--pious statements about firm deadlines and promised studies

--lack of any agreed upon common ground and

--clear promises of renewed battle wherever the Commission again raises the issue of ratemaking principles."

^{17/} FCC 69-842, 18 F.C.C. 2d 761 (1969), JA p. 214.

^{18/} Id., 18 F.C.C. 2d at 764, JA p. 217.

^{19/} Id., 18 F.C.C. 2d at 769, JA p. 228 (Emphasis added).

Even so, our opponents seem to find some comfort ^{20/} in paragraph number (2) of recommended further procedures contained in the Statement, to the effect that the further cost studies therein referred to contemplated some further rate adjustment "filings" by AT&T, possibly as early as Oct. 1, 1969 (See Opinion and Order par. 8). From this, they would apparently have you conclude that the Telpak users had stipulated away any rights they might otherwise have had under the Commission's orders of April 10 and July 10, 1968. To know that such an unlikely event did not happen and is not true, all that one has to do is to read procedural paragraph number (2) in context, that is, ^{21/} with paragraphs (1) and (3), as follows:

"(1) The staff and the participating parties agree to the Statement of Rate-Making Principles and Factors as a basis and guide for further detailed studies on rate levels and rates of Bell's major service categories, without prejudice to the substantive or procedural rights of any party with respect to any adjustments that may result from such studies. For example, agreement to this procedure shall not limit the rights of the parties to raise, in future proceedings, questions such as those respecting rate levels for individual service categories which, but for this agreement, would have been subject to Commission decision in this proceeding.

* * *

"(3) As recognized above, the agreed rate-making principles and factors herein contained are, of necessity, rather general and non-exclusive. An adjudication of other relevant and more specific principles and factors will be required in connection with a Commission determination as to the appropriate rate level for any category of service. No carrier initiated rate level increases will be filed until the new cost studies described in paragraph (2) have been completed and made available to the parties hereto. The effective date of any such rate level increase will be subject to such authority as the Commission may possess. The parties do not agree as to the scope of the Commission's authority under various circumstances to reject, suspend or postpone the effectiveness of carrier initiated rates, and no party, by this agreement, waives its position on this question. If, pursuant to the foregoing, a rate level increase is to become effective, it should be subject to an accounting order upon an appropriately supported request of an affected person."

^{20/} AT&T Br., p. 27; WU Br., pp. 18-19, 49, 51.

^{21/} FCC 69-842, 18 F.C.C. 2d 761, 768 (1969), JA pp. 224-25 (Emphasis added).

How any kind of waiver or prejudice to substantive or procedural rights could ever be constructed out of such careful language as that defies the imagination. The fact that "Docket 16258" was to be "terminated" is of no consequence. The incomplete record continues and the unresolved threshold issues continue.

The fact that the same incomplete record and the same unresolved issues referred to in the Commission orders of April 10 and July 10, 1968 (and in the Commission's order of July 29, 1969, "noting" the agreed Statement for that matter) now have a new docket number, namely Docket No. 18128 et al., which has since become a "warmed over" Docket 16258 for all practical purposes, proves nothing except that the underlying situation recited in the Commission's order of April 10, 1968 remains substantially unchanged. In short, in October, 1969, the Telpak users had the same right to rely upon the substance of the Commission's order of April 10 and July 10, 1968, as they did in July, 1968.

II. The Commission's Undeniable Violation of the Mandate of Section 204 of the Act for an Expedited and Preferential Hearing on the September 1, 1968 Telpak Rate Increase is Reconcilable Only With Pendente Lite Rejection of Further Telpak Rate Increases

The portion of the statute here involved is as clear as a bell:^{22/}

"At any hearing involving a charge increased, or sought to be increased, after the organization of the Commission, the burden of proof to show that the increased charge, or proposed increased charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

It is equally patent that the Commission has violated this statutory command. As we have seen, in July 1968, on its own and, in fact, over the objection of airline petitioners,^{23/} the Commission decided not to promptly

^{22/} Section 204 of the Communications Act of 1934, as amended, 47 USC §204 (Emphasis added).

^{23/} See JA p. 176.

process hearing on the September 1, 1968, Telpak rate increase by consolidation into Docket 16258, but instead to defer the same until after determination in Docket 16258 of the "threshold" questions as to applicable rate-making principles and factors, appropriate rate relationships and rate levels, as between the various classes of service, and after separate hearing and determination of the Telpak Sharing Case (Docket No. 17457).^{24/}

This violation of the mandate of Section 204 continued unchanged until July 29, 1969, when, as we have seen, the Commission noted (without approval) the agreed Statement of innocuous principles (which decided no unresolved issues), and approved certain procedures which contemplated the ultimate termination of Phase I-B of Docket 16258 without decision, the incorporation of that record, as well as the record of the original Telpak Case (Docket 14251) into Docket 18128, but made no provision for hearing on the September 1, 1968 rates in Docket 18128.^{25/} There were no even related procedural developments between July 29, 1969, and October 1, 1969, when AT&T filed its second round of Telpak rate increases for effectiveness on November 1, 1969.^{26/}

We see, therefore, that in October, 1969, when the Commission was faced with a decision on whether or not to reject the second round of Telpak rate increases, almost 14 months had elapsed and the Commission had done nothing by way of hearing on the September 1, 1968 rates, or by way of determining the unresolved remanded issue from the original Telpak Case or the unresolved "threshold" issues of Phase I-B of Docket 16258.

All this would apparently be excused by our opponents, on the loose ground that notwithstanding the statutory mandate for an expedited and

^{24/} FCC 68-711, 13 F.C.C. 2d 853 (1968), JA p. 181.

^{25/} FCC 69-842, 18 F.C.C. 2d 761 (1969), JA p. 214.

^{26/} Transmittal No. 10609, JA p. 272.

preferential hearing on the September 1, 1968, rates, the Commission had broad discretion in "managing" its own proceedings, and that the Courts will not normally second-guess agency decisions on such procedural matters.^{27/}

Petitioners have no quarrel with such general authorities. They simply do not fit the present situation, first, because of the express statutory mandate here involved, and secondly, because the Commission abused its discretion in not availing itself of the opportunity it had to do justice to all parties by making a pendente lite rejection of the second round of rate increases and going ahead with its long-delayed determination of unresolved issues.

The only other argument the opposition makes on this point is a strange one indeed.^{28/} They seem to think that because no one appealed the July 10, 1968 order, when the Commission first indicated that it contemplated some deferment of hearing on the September 1, 1968, rate increase, the parties and the Court are forever foreclosed from taking this part of the Statute and the Commission's continuing violation into account, in determining on this appeal, whether or not the Commission abused its discretion in refusing, under all the circumstances, to reject the second round of Telpak rate increases. If such an appeal had been taken at the time, can there be any doubt that "prematurity of appeal" would have been strongly urged, and probably sustained. But be that as it may, an entirely different question is now presented, namely, in the light of what the Commission had said and done before (and recognizing that there was no appeal therefrom), was its subsequent refusal to reject the second round of rate increases a reasonable exercise of discretion, or was it arbitrary and capricious? It should be clear by now that on that question there has been no waiver or laches by petitioners.

^{27/} FCC Br., p. 27; AT&T Br., pp. 28-32; WU Br., p. 30.

^{28/} AT&T Br., pp. 28-29; WU Br., pp. 28-32.

In October 1969, the only reasonable way the Commission could have complied with the letter and spirit of its orders of April 10, and July 10, 1968 for a "completed" record and "determination" of the unresolved "threshold" issues before consideration of any further rate increases, and still not have been in prejudicial violation of the expedition provisions of Section 204, would have been to reject the second round of Telpak rate increases pendente lite, that is, pending the determination of those questions in connection with the September 1, 1968, rates. This accommodation between the Commission's obligation to pre-existing litigants and its obligation under the expedition statute would have prejudiced no one. Certainly not the carrier, then under surveillance for reduction of excessive revenues; and unless one prejudices the issues to be determined, no one could say in advance that any other party would be prejudiced.

III. The Commission and Its Defenders Would Apparently Have the Court Accept, as Bases for Affirmance, the Self-Same Predicates of the Commissioners' Expressed Predilections and Apparent Prejudgment

It might be helpful, first, to make a laundry list of the predilection and prejudgment "predicates" we have in mind. In no particular order, they are:

1. The "wide" and "startling" disparity between the original Telpak rates and private line rates.^{29/}
2. The dissenting opinion of Commissioner Cox in the original Telpak Case.^{30/}
3. The alleged results of certain cost studies in the original Telpak Case,^{31/} and of the original Seven-Way Cost study.^{32/}

^{29/} FCC Br., p. 6; AT&T Br., p. 2; WU Br., pp. 3-4, 38. Cf. FCC Br., p. 15, fn. 11, AT&T Br., p. 11; WU Br., pp. 17-18.

^{30/} WU Br., p. 20.

^{31/} FCC Br., pp. 5-6; AT&T Br., p. 2; WU Br., pp. 4, 16, 29, 36-37.

^{32/} FCC Br., pp. 7-8; WU Br., pp. 37-38.

4. The repeated claims and charges, especially by Western Union, to the effect that all Telpak rates pre-existing the Feb. 1, 1970 rates have been "unlawfully discriminatory", "unlawfully low", have resulted in "inherent subsidy" and "perpetuation of subsidy" to Telpak users, and the like.^{33/}

5. The dissents of Commissioners Cox and Johnson to the three months' suspension of the second round of Telpak increases, in which they evidenced their predilections and apparent prejudgment.^{34/}

As a group, all such materials could have but one purpose, viz., somehow to color the case against petitioners, and thus psychologically to influence in some way the Court's disposition of this case, although the Court could not possibly rely upon a single item, much less the whole group, without giving a stamp of approval to the apparent prejudgment of the Commission. This will be more demonstrable, we believe, upon detailed consideration of each item.

1. "Wide" and "startling" disparity between original Telpak rates and private line rates: The carrier opponents have seen fit to set forth in their respective briefs figures on this subject from the original Telpak Case, including Telpak A and B. The short answer is that this material is completely irrelevant for several reasons:

First, Telpak A and B have long since been outlawed and cancelled.

Second, the price differential between private line and original Telpak C and D has long since been validated, in the sense that the Commission itself found it justified by competitive necessity (vis a vis private microwave), subject only to further hearing and determination as to whether compensatory or not (the hearing and determination which the Commission itself has never held or made).

^{33/} WU Br., pp. 4, 13, 20, 39, 42.

^{34/} FCC 69-1196, 20 F.C.C. 2d 383, 389, 390 (1969), JA pp. 563, 566.

Third, the non-Telpak private line user stands to gain absolutely nothing by reason of the Commission's refusal to reject the second round of Telpak rate increases and, by the same token, would have lost absolutely nothing if such rate increase had been rejected. Nowhere in connection with its second round of Telpak rate increase has AT&T offered to make any reduction for the non-Telpak private line user. The rate for the non-Telpak private line user remains precisely the same in either event, pending the determination of all the unresolved issues on rate-making, rate levels and rate relationships in Docket 18128.

2. The dissenting opinion of Commissioner Cox in the original

Telpak Case: The text involved here is quoted by Western Union at page 20 of its brief. It will be recalled that the occasion for this dissent was Commissioner Cox's lone view that Telpak C and D should have been outlawed at the same time as Telpak A and B, contrary to the rest of the Commission's finding of justification by competitive necessity, subject to further hearing on compensatory level.^{35/} That Commissioner Cox does not give up easily on his dissenting views is borne out by some of his subsequent speechmaking on the same subject.^{36/} The assertion made by Western Union, purportedly supported by Commissioner Cox's original Telpak Case dissent, is that petitioners are seeking "to retain the benefits of the subsidy inherent in the discriminatory, low Telpak C and D rates for as long as possible".^{37/} This kind of argument can be made or accepted only if one accepts the false premise that any such Commission decision has been made, or prejudices the same.

3. The alleged results of certain cost studies in the original Telpak Case, and of the original Seven-Way Cost study: This is ancient

^{35/} 37 F.C.C. 1111, 1119-20 (1964).

^{36/} See petitioners' brief, p. 24, fn. 65, and Appendix C.

^{37/} WU Br., p. 20.

history indeed. Notwithstanding the low investment returns from Telpak C and D allegedly shown in the original Telpak Case, the Commission found competitive necessity justification for these rates, subject to further hearing on compensativeness. So much for the studies antedating the Commission's original decision. The genesis and posture of the results of the original Seven Way Cost study should also be set to rest once and for all. It is quite true that in connection with the Domestic Telegraph Investigation (Docket No. 14650) and at the direction of the Telephone and Telegraph Committees of the Commission, AT&T made, for the year ending August 31, 1964, a fully distributed cost study, in the form prescribed by the Commission's staff, which showed a relatively low rate of return for Telpak and other private line services, in relation to the return for message toll and WATS services. In passing, it should be noted that there was no cross examination, rebuttal evidence, or adjudication with respect to the results of this prescribed study. Instead AT&T set forth in exhibit form its "reservations or limitations which it believed to be pertinent to the findings of the study". The important point is that in its April, 1966 Report, the Commission "reserve[d] the resolution of these, and other appropriate questions, for Docket No. 16258."^{38/} It is also true that the results of the original Seven-Way Cost Study have been dumped into the record in Docket 16258,^{39/}

^{38/} "Specifically, AT&T urged that the design of rate structures involves factors other than fully allocated costs (e.g. value of service.) Also the telephone company warned against applying the resultant earnings levels to later periods, because of intervening rate changes, introduction of new services, etc. Finally, the company observed that the earnings from message toll telephone (the largest service category) benefit from the other services because the latter absorb a portion of the joint and common costs incurred in providing a variety of services." Report of Telephone and Telegraph Committees, Domestic Telegraph Investigation (1966, pp. 200,204).

^{39/} Docket 16258, FCC Staff Exhs. 1-8.

plus a Broad Brush updating of the same to 1967,^{40/} plus identification of a new Nine-Way Cost study,^{41/} and a new Fully Distributed Cost study has been promised by AT&T as of the end of August, 1970.

The point simply is that there has been no cross-examination of any of these fully distributed cost studies in Docket 16258 (or in any other docket), much less any opportunity for rebuttal, or any adjudication thereon, and no one (party, Commission or Court) is entitled to draw any decisional conclusions therefrom at this time with respect to benefit, burden, or appropriate rate level as between classes of service. In other words, it would be just as appropriate (if not more so, time-wise), for the Airline Industry to point to the results of its own long-run incremental cost evidence in Docket 16258 to show that the original Telpak C and D rates were fully compensatory, or the results of "Method 3" of AT&T's Nine-Way Cost study to show that the second round of Telpak rate increases, on even a fully distributed cost basis, would yield a return of over 10%,^{42/} as it is for Western Union or the Commission to talk about the low yields shown by the original Seven-Way Cost study. The immutable point still is that no such "picking and choosing" from incomplete cost study evidence of record, without some adjudication of applicable principles, methodology, and results can possibly be relied upon by anyone to justify non-rejection of the second round of Telpak rate increases.

^{40/} Docket 16258, FCC Staff Exh. 37.

^{41/} Docket 16258, FCC Staff Exh. 48.

^{42/} Petitioners Motion for Stay Pending Review, Attachment A, page 1.

4. The repeated claims and charges, especially by Western Union, to the effect that all Telpak rates pre-existing the Feb. 1, 1970 rates have been "unlawfully discriminatory", "unlawfully low", have resulted in "inherent subsidy" and "perpetuation of subsidy" to Telpak users, and the like: Since these "bootstrap" charges rest largely upon the false premises already noted, not too much further comment would seem to be required. However, it may be worth noting that the "repeated claim or charge" technique here employed is not too different from the "Big Lie" technique of other days. Here again, Western Union would like to reach back to that part of the Commission's decision in the original Telpak Case, outlawing Telpak A and B as unduly discriminatory, without any decision "on lawfulness in relation to competition" (the express finding of the Commission); ^{43/} couple that with some of its competitive impact evidence in that old case; add Commissioner Cox's views for outlawing Telpak C and D as well; parlay the allegation that Western Union has suffered and will continue to suffer great damages from the original Telpak C and D rates, notwithstanding the intervening September 1, 1968 rates; and then conclude, therefrom, that the Commission did the right thing in not rejecting the second round of Telpak rate increases. This, then, is the kind of argument Western Union would have this Court accept and rely upon for affirmance of the Commission's refusal to reject. The plain and simple truth of the matter is that Western Union tried to kill Telpak in the original Telpak Case, succeeded in knocking out Telpak A and B, and is simply unreconciled, as is Commissioner Cox, to the Commission's decision on Telpak C and D. Its cries are simply those of a high cost operator for "umbrella" ratemaking, a concept which the Commission itself has consistently refused to accept, as diametrically opposed to its own "bellwether" approach

^{43/} 38 F.C.C. 370, 394 (1964).

^{44/}
for better serving the public interest.

5. The dissents of Commissioners Cox and Johnson to the three month suspension of the second round of Telpak increases, in which they evidenced their predilections and apparent prejudgment: We never expected to see the day when this Court would be asked to accept voiced predilections evidencing apparent prejudgment as a basis of affirmance of the Commission action in question, and yet that is precisely what has happened here. First, let us scrutinize what Commissioner Cox said in refusing to go along with the majority in suspending the second round of Telpak rate increases to Feb.1,1970:^{45/}

"In view of the delay in correcting the discriminatory TELPAK rates, I would suspend the new tariff for only one day, or until the company files tariffs covering the off-setting reductions in message toll telephone rates which are to be made."

It must be remembered that this comment was made in October, 1969, in the face of the fact that through no fault of the Telpak users there had been no Commission determination of the compensativeness of the original Telpak rates (pending at least since late 1966 after this Court's affirmance of the Commission's original decision); that, even so, an increase of over 40% had

^{44/} The Report of the Telephone and Telegraph Committees in the Domestic Telegraph Investigation, Docket 14650 (1966), recommended "that, on whatever basis finally approved, Bell and Western Union each be required to fix rates that yield a fair return on those services that are directly competitive; subject to the condition that, if the rates of one carrier are lower at a fair rate of return to it, then the other carrier would have to match such lower rates in order to stay in the market, even though these lower rates may not produce a fair rate of return for that carrier. Thus, the low cost carrier would be the rate 'bellwether' and efficiency of operation would be assured." P. 9. If Bell were required to fix its prices at the same level as Western Union, "this proposal would require that the Commission abandon the bellwether concept and go 180 degrees in the opposite direction. Rates could no longer be fixed on the basis of the performance of the most efficient carrier; rather, Western Union's revenue requirements would be controlling." Page 270.

^{45/} 20 F.C.C. 2d at 389, JA p. 563 (Emphasis added).

been in effect under an accounting since September 1, 1968; and that the Commission had made none of the "threshold" determinations it had promised to make since April and July, 1968. The question naturally arises, without some predilection from his dissent in the original Telpak Case, and without some prejudgment on such unresolved issues, how could anyone speak in terms of a long overdue "correction" in Telpak rate level? The same is true of Commissioner Johnson's dissent in this regard, the only difference being that he talks in terms of the Commission's feelings about the probable non-compensatory character of Telpak, and adverts to some of AT&T's evidence on the subject:^{46/}

"Telpak is the service which the Commission has believed could be noncompensatory, that is, its rates do not compensate Bell for its costs and are designed to meet competition from private carriers. Even Bell's studies show a need to raise these rates."

To this Western Union has added another gem from Commissioner Johnson's dissent, the reasoning of which it apparently would like the Court to accept:^{47/}

"The Commission is going to suspend the new TELPAK rates for the maximum period allowed by law -- 90 days. For the purposes of a hearing and accounting order, a one-day suspension would serve as well. Large users of communications services will thus have the effect of the rate increases postponed -- despite the fact that TELPAK users have been on notice for eight years that the TELPAK rates may be non-compensatory and for months that rate increases were coming."

From this, it is apparent that Commissioner Johnson "bought" the old argument about "notice and warning", without regard for the Commission's orders of April 10 and July 10, 1968, or for the rights of litigants in pending and unresolved litigation before the Commission.

^{46/} 20 F.C.C. 2d at 390, JA p. 566 (Emphasis added).

^{47/} Ibid. (Emphasis in original).

Petitioners recognize, of course, that Commissioners Cox and Johnson were only two of the six Commissioners passing on the rejection question, and that the views recited above were in connection with their position in favor of a one-day, as against a three months, suspension of the new rates. Even so, these positions could stem only from predilections amounting to apparent prejudgment, and no one can say to what extent these views influenced the other members of the Commission in deciding against rejection. That is the vice inherent in this kind of a situation, as recognized by this Court^{48/} recently, and that is the reason it would be absurd to hold, as contended by the opposition, that the Court is powerless to do anything about it until after the ultimate result conditioned by such prejudgment becomes an end-of-case adjudication. Courts have indeed decided the issue of prejudgment in advance of final agency action.^{49/} Such action is always available in the exceptional case, such as here, where the Court is "confronted by a situation where the asserted infirmity is fundamental".^{50/}

^{48/} Cinderella Career and Finishing Schools, Inc. v. FTC, Case No. 22,624 (U.S. App. D. C. March 20, 1970), slip opinion, pp. 17-18.

^{49/} See the decision of this Court in Amos Treat & Co. v. SEC, 113 U.S. App. D.C. 100, 306 F. 2d 260 (1962); see also Air Transport Association of America v. Hernandez, 264 F. Supp. 227 (D.D.C. 1967).

^{50/} Amos Treat & Co. v. SEC, *supra*, 306 F. 2d at 265. See also SEC v. R. A. Holman Co., 116 U.S. App. D.C. 279, 281, 323 F. 2d 284, 286 (1963), cert. den. 375 U.S. 943 (1963), and cases cited therein. AT&T's reliance upon this case as ruling out any judicial determination in advance of final agency action, no matter how compelling the circumstances, is obviously misplaced.

IV. Apparent Prejudgment of Pendente Lite Issues is Further Confirmed By Coupling Of Admittedly "Offsetting" Rate Increases and Rate Decreases in the Face of Excessive Earnings by the Carrier or, at the Least, Admittedly No Need For Additional Revenues

Here we have a most unusual situation indeed. The Commission^{51/} and the carrier^{52/} piously disclaim that there was any kind of a packaged "deal", although they never once deny the detailed negotiations recited in the revealing dissenting opinion of Commissioner Johnson.^{53/} Instead, they say, AT&T simply offered to "offset" its proposed \$87,000,000 of Telpak et al. increases under an accounting with an unqualified \$87,000,000 reduction in message toll and WATS rates, and the Commission simply accepted such reduction, without, of course prejudging what it might ultimately do on the Telpak et al. increases. Incidentally, the Commission also granted the carrier special tariff permission to withdraw on one day's notice the \$87,000,000 rate reduction in the event the Court prevented the \$87,000,000 rate increase from going into effect.^{54/} By any other name than "deal", the result would smell the same. And to use the recent language of Judge Tamm,^{55/} it does not take great olfactory powers to appreciate what has happened here.

Besides, Western Union makes no bones about the purpose of the admitted offer and acceptance "offset", whatever else one may call it.^{56/} Western Union says affirmatively, apparently thinking this would help bring about Court affirmance, that since AT&T was under surveillance for excessive

^{51/} FCC Br., pp. 41-42.

^{52/} AT&T Br., pp. 33-34.

^{53/} FCC 69-1210 (1969), JA pp. 575-80.

^{54/} AT&T Application No. 739, and letter, Reference 9310, from Chief Common Carrier Bureau, December 31, 1969.

^{55/} Cinderella Career and Finishing Schools, Inc. v. FTC, Case No. 22,624 (U.S. App. D.C. March 20, 1970), slip opinion, p. 14.

^{56/} WU Br., p. 36.

earnings and did not need the additional revenues, the purpose of the off-setting rate increases and decreases had to be to make further rate adjustments as between Telpak et al. on the one hand, and message toll and WATS, on the other.^{57/} On this, petitioners agree with Western Union — that had to be the purpose. The only difficulty is that both sides of the adjustment were not under surveillance. One was under surveillance of the over-all earnings of the carrier, which could well result in substantial adjustments in message toll and WATS, as the source of 85% of the revenues of the Company. But the other side of the adjustment, namely, in the level of Telpak et al. rates, was and is in litigation in incomplete hearings and undetermined proceedings.

Our opponents would obviously like to have it both ways. They would like for the Court to believe that there was "no deal" and that AT&T is still taking its chances on an adverse ultimate decision by the Commission on the merits of the second Telpak rate increase, and at the same time accept the argument that the Court should not disturb the Commission's action because if it did, it would injure the message toll and WATS users who are receiving the benefits of such a "no deal".

There is only one answer to this situation. Surveillance is surveillance, is surveillance, for regulating overall revenues and return within prescribed or allowed limits. Rate litigation is rate litigation, is rate litigation,^{58/} for determining ratemaking principles, rate levels, and rate relationships for various classes of service. Never the twain shall meet,

^{57/} Ibid.

^{58/} Cf. Sea-Land Service, Inc. v. Connor, --- U.S. App. D.C.---, 418 F. 2d 1142, 1146 (1969), that "a hearing is a hearing, is a hearing* * *."

in the form of "offsetting" rate adjustments for different classes of service; and if they do, the threat to the integrity of the quasi-judicial process of the Commission is the greatest loss.

This does not mean that message toll and WATS users, as providers of 85% of the revenues of the carrier, should not have most of the benefits of any and all reductions resulting from proper surveillance to prevent excessive earnings, on its own merits. What it does mean is that no part of any such reduction, much less \$87,000,000 worth, should be "offset" or tied in any way to an \$87,000,000 increase in rates for other classes of service already involved in pending litigation with respect to two lower levels of rates. It is truly shocking that the Commission had little or no appreciation of the fundamentals here involved. Based on their statements noted in the preceding section, Commissioners Cox and Johnson obviously intended the same class rate adjustment results recognized by Western Union, and now urged by it before the Court as justification for the Commission's action. In the light of their action, and in the absence of contrary expression, the other members of the Commission must have been parties to the same misconception of responsibilities, as between surveillance and litigation.

V. The Irreparable Injury to Petitioners Resulting From the Commission's Failure to Reject Has Not Been Answered

Although the Commission avers that any damages which petitioners may suffer from the refusal to reject will be effectively "curtailed", if they prevail on the merits, because they will be "compensated" under the accounting procedure of Section 204 and the damage provision of Section 207 of the of the Communications Act,^{59/} and while AT&T contends that the users' right

^{59/} FCC Br., pp. 21-22.

to lawful rates during the hearing period is "protected and preserved" by the accounting and refund provisions of the Commission's order,^{60/} the fact is that an accounting and a complaint for damages are plainly inadequate remedies to compensate for the substantial irreparable injury incurred, as Western Union apparently concedes but seeks to excuse or justify.^{61/}

A. The Inadequacy of Accounting Alone
As a Remedy Has Been Conceded

AT&T has acknowledged that much of the injury suffered by Telpak users is irreparable, because of the limited scope of the Commission's accounting order:^{62/}

"* * * Their principal assertion is that, as a result of the reduced equivalency of telegraph grade to telephone grade channels contained in the TELPAK tariff revision * * *, customers may be required to order individual private line services to meet requirements which could have been priced in TELPAK sections under a higher equivalency ratio. * * *

"[T]he only charges subject to refund under the Act are those previously suspended - which, in this case, are the TELPAK charges. Hence, there is no statutory basis for requiring an accounting of amounts received under other tariffs whose charges have not been increased or suspended.

"On practical grounds as well, * * * TELPAK sections typically form parts of complex and dynamically changing communications systems. * * * These rate increases will undoubtedly impel some customers to revise their requirements and undertake extensive reconfigurations of their systems."

The Commission has also recognized that the accounting provisions of Section 204 of the Act are clearly inadequate, at least with respect to the

^{60/} AT&T Br., p. 44.

^{61/} WU Br., pp. 16-18 and 23 characterizing the injury as "damnum absque injuria".

^{62/} AT&T Opposition to Petition for Reconsideration, JA pp.706-08 (Emphasis added).

charges imposed by the change in the telegraph/telephone equivalency ratio:^{63/}

"The very nature of identification of channels that are at this date affected by the change in equivalency ratios, and channels added in the future that may be affected thereby, contain sufficient questions of fact that an accounting order is not well suited to such changes."

Under the further Telpak increases currently effective, only two telegraph channels are permitted to be derived from each telephone channel provided under the Telpak tariff, although advancing technology permits 18 telegraph channels to be derived from one voice channel. The telegraph/telephone equivalency, in going from 12:1 to 6:1 and now to 2:1 under the tariff, has thus been proceeding in the opposite direction from the developing technological state of the art. As a result of the latest tariff change, it is necessary to use three times as many telephone channels as under the interim rates, and six times as many telephone channels as under the original rates, in order to receive the same amount of telegraph service. Many of the Telpak C and D sections, of 60 and 240 telephone channels respectively, have become inadequate to provide the telegraph service required. To ascertain how best to provide for the additional channels required (without any increase in the service provided), it has been necessary to redesign the entire communications network to determine whether in specific cases to reroute this "overflow" requirement through other Telpak sections, to lease additional Telpak sections, to lease private line channels, to substitute other methods of communications,^{64/} or to cut back on some communications uses.

AT&T's attempt to justify this equivalency on the ground that the ratio between the charges for telegraph and telephone channels (including

^{63/} FCC 70-75, 21 F.C.C. 2d 1, 6 (1970), JA p. 730 (Emphasis added).

^{64/} Petitioners' Motion for Stay Pending Review, Appendix D.

terminals) in the Telpak offering is slightly under a 2 to 1 ratio^{65/} proves nothing insofar as cost justification for the equivalency ratio change is concerned, or insofar as concerns adverse impact upon the Telpak users. The telegraph/telephone equivalency affects only line haul charges and should be related to the costs of deriving telegraph channels from telephone channels, which technologically has a ratio of not 2:1 but 18:1. AT&T in its filing conceded that "considerably more than two telegraph channels can be physically derived from a voice channel," but argued that "this is offset by the fact that terminal costs for telegraph channels are considerably higher than those for telephone. It is the combined effect of these two phenomena that results in the overall cost relationships referred to above."^{66/}

But these "two phenomena" have two separate applicable charges, and there is a tariff charge provided for terminals just as there is a charge which should properly reflect the cost of deriving telegraph channels from telephone channels. AT&T's bald statement accompanying the tariff changes was clearly insufficient to begin to meet the requirements of Section 61.33(a) of the Commission's Rules and Regulations, for "showing in detail the reasons for all changes in charges or regulations and in case any such change results in increased charges, the facts upon which the carrier relies in justification thereof."^{67/} AT&T's filing was not merely no showing "in detail", but no showing or justification at all. The illustrations of charges for different line hauls presented by the Associated Press^{68/} and AT&T,^{69/} taken in tandem, merely serve to illustrate that AT&T's charges do not fairly reflect the

^{65/} AT&T Br., pp. 42-43.

^{66/} JA p. 288 (Emphasis added).

^{67/} 47 C.F.R. § 61.33(a).

^{68/} AP Br., pp. 27-28.

^{69/} AT&T Br., pp. 42-43.

appropriate charges for the services rendered by AT&T on the basis of length of haul, in view of the obvious discrimination against the longer haul users with less terminals.

AP's further point that a 2:1 equivalency constitutes an "arbitrary limitation of carrier spectrum" under a Telpak offering, restricting the user to only one ninth of the bandwidth which could be obtained under present technology by an 18:1 equivalency,^{70/} is not "a premature attack on the substantive legality of the tariff", as AT&T declares,^{71/} but underscores the failure of the carrier to comply with the minimum requirements of Section 61.33(a) to show some cost related justification for the increased charge in question (change in equivalency ratio) not for some other charge (telegraph terminals). AT&T's filing is thus basically defective, because it does not begin to undertake to show, where there are two elements to the service rendered and charges for each are imposed, why the charges are not, in some measure at least, related to the functions and costs of each of these elements.

The resulting overcharges and rate distortions are not inconsequential -- as an illustration of the magnitude of the change involved, the airline industry alone must pay an additional \$3.7 million in increased charges because of the change in telegraph/telephone equivalency alone, thus tripling the costs to the industry for leasing more than 2 million miles of telegraph lines.^{72/}

B. The Suggested Right to Sue For Damages
Is Highly Questionable and Does Not
Fill the Gap

While conceding that an accounting order is an inadequate remedy to compensate for the additional charges occasioned by the change in telegraph/

^{70/} AP Br., pp. 28-29.

^{71/} AT&T Br., p. 43.

^{72/} Petitioners' Motion for Stay Pending Review, Appendix D.

telephone equivalency ratios, the Commission has suggested that "a complaint requesting damages filed by each party affected by the equivalency ratio would seem to be the most efficient way of handling the problem."^{73/} However, the uncertainties and apparent infirmities in prosecuting a complaint for damages clearly fail to bridge the gap to protect users against substantial irreparable injury from consequential or indirect damages sustained in the revision of customer requirements and the extensive reconfigurations of communications systems.

Among the defects of a complaint for damages, providing at best a most inadequate remedy, there may be noted the following:

- a. Section 206 may be construed to reach only those actions committed, or tariff charges imposed, after they have been "prohibited or declared to be unlawful".
- b. An accounting may be held to be mutually exclusive with a complaint in damages.
- c. Section 415 of the Act imposes a one-year statute of limitations, with considerable uncertainty when the year commences to run.
- d. The suspension statute places the burden of proof for increased charges upon the carrier, but Section 206 shifts the burden to the complainant.
- e. Section 1.723 of the Commission's Rules and Regulations requires strict conformity in alleging and proving damages.
- f. A complaint for damages must be litigated separately from a rate case under an accounting.
- g. Interest on recovered sums may be denied.
- h. In any event, the losses in service, efficiencies, and innovations can never be recaptured; no relief can be provided for the disruptions, costs, and losses in the redesigning of substitute systems grossly distorted to adapt them to a new rate structure; and injury in losses to the public to whom the Telpak users provide service cannot be adequately measured, or adequately recompensed.

^{73/} FCC 70-75, 21 F.C.C. 2d 1, 6 (1970), JA p.730 (Emphasis added).

While Section 206 of the Communications Act authorizes a complaint for damages where a common carrier has committed an act which is "prohibited or declared to be unlawful",^{74/} it may well be argued that, by definition, any tariff which is permitted to go into effect cannot be said to have been "prohibited" or "declared to be unlawful" unless and until the Commission has actually made that determination, and consequently the right to recover damages cannot begin to accrue until after an express declaration by the Commission of illegality. Since the decision in the pending rate case will apply only to the issues before the Commission in that docket, which relates to the accounting provisions, it appears that the complaints for damages would have to be litigated subsequently and separately. And it may then be argued that accounting precludes a recovery for damages, AT&T already having taken the position that by the accounting provisions of Section 204 of the Act, the Congress has "expressly defined the measure of the protection that the customers should receive by the terms of the refund provision," although AT&T has conceded that it is "conceivable" that "in some circumstances" a customer might have a valid claim for unliquidated damages.^{75/}

A recent case before the Commission's Review Board, initiated by a complaint filed five years ago, while related to other tariff provisions, illustrates some of the difficulties, uncertainties, and technical pitfalls in the requirements of Section 1.723 of the Commission's Rules and Regulations^{76/} that a complaint must allege damages with certainty and specificity. After a Hearing Examiner had ruled that an AT&T tariff was unjust, unreasonable, and unduly discriminatory, but disallowed the claim made for some damages, the complainant (HSN) sought to reopen the record to claim other damages, but the

^{74/} 47 U.S.C. § 206.

^{75/} Memorandum of AT&T in opposition to petitioners' motion for stay, filed herein January 22, 1970, pp. 68-69.

^{76/} 47 C.F.R. § 1.723.

77/

Review Board refused, ruling in part:

"Initially, the Board notes that HSN's claim for damages is procedurally defective. Section 1.723(a)(1) of the Commission's Rules specifies that in the event a complainant seeks to recover damages from a common carrier, the complaint shall state '[t]hat the complaint makes claim for damages.' Section 1.723(b) further specifies that '[d]amages will not be awarded upon a complaint unless specifically requested.' HSN, however, made no more vigorous gesture toward compliance with Section 1.723(a) and (b) of the Rules than to list in a footnote to paragraph 5 of its complaint the total amount paid to AT&T for occasional service and to plead, in paragraph 17, that for AT&T to require stations to purchase occasional service at then existing rates (based on a one-hour unit) was 'unjust and tend[ed] to discriminate against new stations and to discourage their establishment.' Thereafter * * * '[p]roof of damages pertaining to occasional service was not pressed at hearing.' * * * [a]ll of [HSN's] testimony has been directed toward what would be a reasonable rate structure and what rates the Commission should prescribe.' * * * What damages HSN did seek were exclusively for monthly (contractual) charges and at no point before or during hearing did petitioner specifically allege, much less adduce proof of occasional use damage. Petitioners have failed utterly to comply with Section 1.723(a) and (b) of the Commission's Rules which here required seasonable allegations of damages incurred in consequence of AT&T's occasional rate charges. Petitioner cannot now cure its failure and substantially alter the gravamen of its complaint by recourse to AT&T's recently filed occasional use tariffs.* * *"
&c. &c.

Both carriers have suggested that interest on any charges found to be unlawful, which could be quite substantial and extend over a number of years, may be denied. Western Union has stated that even if the Commission should order refunds, "equitable considerations may very well warrant the Commission in not requiring any interest to be paid."^{78/} AT&T has declared that if some rates are found too low, and others too high, "there would be no opportunity to collect additional amounts from those customers whose charges were too low during the period of investigation. This inability of the carrier to recoup from those customers whose rates are found to have been too low may properly

77/ Hughes Sports Network, Inc. v. AT&T, FCC 70R-124 (1970), par. 6.

78/ Opposition to AIA Motion, JA p. 624.

be considered by the Commission in determining the extent to which the ordering of refunds is proper, and whether interest on such refunds should be imposed."^{79/}

VI. Conclusion - The Court Should Not Hesitate To Require the Commission To Do That Which, In All Fairness, It Should Have Done In the First Place, Namely, Reject The Second Round of Telpak Rate Increases
Pendente Lite

At one point in its brief, Western Union purports to balance "counteracting benefits".^{80/} We quite agree that there should have been, and should still be, a balancing of equities, so to speak, in this most unusual rate case situation.

The Commission missed a perfect opportunity to do so, and to accomplish what we have already termed a "reasonable accommodation" as between its duty under the expedition provisions of Section 204 and its responsibilities, under its own prior orders, to litigants in pending, incomplete and undetermined adversary proceedings. The accommodation which could have prejudiced no one unduly, if at all, would have been to reject, pendente lite, the second round of Telpak rate increases.

Why do we say, no undue prejudice, if any, to anyone? Let's examine the field:

First, the carrier (AT&T) can be eliminated quickly by reason of the fact that it admittedly had no need for additional revenues, and sought none, in the light of its proposed "offsetting" decreases to message toll and WATS users.

Second, the non-Telpak private line user, for whom such great concern has been exhibited in opposition briefing. He stood to lose or gain absolutely nothing from rejection or non-rejection of the Telpak rates in question. His rates remained the same, in either event, unless and until changed as a result of further hearings on the underlying, undetermined questions in Docket 18128.

^{79/} Opposition to AIA Motion, JA pp. 640-41.

^{80/} WU Br., pp. 21-22.

Third, the message toll and/or WATS users, whose \$87,000,000 in rate reductions were improperly "offset" by an \$87,000,000 increase in Telpak et al. rates. All the Court has to do here is to tell the Commission that surveillance rate adjustments cannot be "offset" or otherwise tied to adjustments of rates in litigation, but that any overall reductions required to reduce excessive earnings, as properly found on its own merits in continuing surveillance proceedings, may as before be passed on to such users as providers of 85% of the revenues of carrier.

And lastly, Western Union, which succeeded a long time ago in having Telpak A and B outlawed, and has had the benefit of a roughly 40% increase in Telpak C and D rates, in the form of the September 1, 1968 rates under an accounting, and which is a party to all the undetermined litigation. There is no demonstrated, much less adjudicated, fact or reason why Western Union should not take its chances on the ultimate results of such litigation, the same as all other parties thereto. It has made no case for any special protection or consideration, even as against the original Telpak C and D rates, much less as against the much higher September 1, 1968, level of such rates.

In most litigated situations, there is nearly always a fair and reasonable interim solution, pendente lite. The September 1, 1968, rates under an accounting afforded such a solution. That is the obvious reason there was no appeal therefrom. In the litigated posture of the proceedings, it was unfair and unreasonable, to the point of abuse of discretion, for the Commission to transfer all the burden of a 100% plus rate increase to the Telpak users, pending the results of such litigation, at a time when the carrier admittedly did not need the revenues and the properly adjudicated rate adjustments, as between classes of service, could not be legally made.

We submit, therefore, that this Court should not hesitate to say to the Commission: Do that which should have been done in the first place - in conformance with your statutory and due process responsibilities, and

and without undue prejudice to anyone - reject the second round of Telpak rate increases pendente lite and get on with the necessary hearings and adjudications.

Respectfully submitted,

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